

No. 96-1037-CSX Title: Kiowa Tribe of Oklahoma, Petitioner
v.
Manufacturing Technologies, Inc.

Docketed: Court: Court of Appeals of Oklahoma,
January 2, 1997 First Division

See also:
96-1215

Entry	Date	Proceedings and Orders
Dec 23 1996		Petition for writ of certiorari filed. (Response due February 1, 1997)
Feb 3 1997		Brief of respondent Manufacturing Technologies, Inc. in opposition filed.
Feb 19 1997		DISTRIBUTED. March 14, 1997
Mar 17 1997		The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Jun 6 1997		Brief amicus curiae of United States filed.
Jun 10 1997		REDISTRIBUTED. June 26, 1997
Jun 27 1997		Petition GRANTED. SET FOR ARGUMENT January 12, 1998. *****
Aug 5 1997		Order extending time to file brief of petitioner on the merits until August 25, 1997.
Aug 7 1997		Brief amici curiae of Choctaw Nation of Oklahoma and Chickasaw Nation filed.
Aug 15 1997		Brief amici curiae of Navajo Nation, et al. filed.
Aug 22 1997		Joint appendix filed.
Aug 22 1997		Brief amicus curiae of Fond Du Lac Band of Lake Superior Chippewa filed.
Aug 25 1997		Brief of petitioner Kiowa Tribe of Oklahoma filed.
Aug 25 1997		Brief amici curiae of Cow Creek Band of Umpqua Tribe of Indians, et al. filed.
Aug 25 1997		Brief amicus curiae of United States filed.
Aug 25 1997		Brief amici curiae of Assiniboine and Sioux Tribes of Fort Peck Reservation, et al filed.
Aug 25 1997		Brief amici curiae of Cheyenne-Arapaho Tribes of Oklahoma, et al. filed.
Aug 25 1997		Brief amici curiae of Seminole Nation of Oklahoma and the Muscogee (Creek) Nation filed.
Aug 25 1997		Brief amici curiae of Shakopee Mdewakanton Sioux (Dakota) Community, et al. filed.
Sep 25 1997		Brief amicus curiae of Oklahoma filed.
Sep 26 1997		Brief of respondent Manufacturing Technologies, Inc. filed.
Sep 26 1997		Brief amici curiae of First National Bank of Altus and Raymond Friedlob, Receiver filed.
Sep 26 1997		Brief amici curiae of South Dakota, et al. filed.
Oct 10 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 20 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Entry	Date	Proceedings and Orders
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Oct 28 1997	Reply brief of petitioner Kiowa Tribe of Oklahoma filed.
Nov 25 1997	CIRCULATED.
Nov 25 1997	Record filed.
Jan 12 1998	ARGUED.

1

961037 DEC 23 1996

No. OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeals, Division I,
for the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

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December 23, 1996

43 P/P

(i)

QUESTIONS PRESENTED

Whether, under the Indian Commerce Clause, a federally recognized Indian tribe that has not waived its sovereign immunity, is subject to the "inherent jurisdiction" of a state court because the commerce from which the suit arises took place, in part, outside tribal territory?

Whether, under the Indian Commerce Clause and the Treaty Clause, state jurisdiction over Indian tribes can be limited solely by an explicit "ouster" of that jurisdiction by Congress?

(ii)

LIST OF PARTIES

The Kiowa Tribe of Oklahoma
Petitioner/Defendant

Manufacturing Technologies, Inc., an Oklahoma corporation
Respondent/Plaintiff

(iii)

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FOR THE WESTERN DISTRICT
OF OKLAHOMA

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(v)

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No. _____

**In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996**

THE KIOWA TRIBE OF OKLAHOMA

Petitioner,

v.

**MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,**

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS, DIVISION I,
FOR THE STATE OF OKLAHOMA**

**Petitioner, The Kiowa Tribe of Oklahoma,
respectfully prays that a writ of certiorari issue to review
the decision of the Court of Appeals, Division I, State of
Oklahoma entered on June 28, 1996.**

OPINION BELOW

The opinion below was from the Court of Appeals of the State of Oklahoma, Division I. It was not published. The case was styled *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, No. 86,489. It was entered June 28, 1996. The text of this opinion is reproduced in the Appendix. The Oklahoma Supreme Court denied the Kiowa Tribe of Oklahoma's certiorari petition on September 25, 1996, without opinion.

JURISDICTION

The opinion of the Oklahoma Court of Appeals was entered June 28, 1996. Certiorari was denied by the Oklahoma Supreme Court on September 25, 1996. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

"The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Article II, Section 2, of the United States Constitution:

"[The President] shall have Power, by and with the advice and consent of the Senate, to make Treaties . . ."

STATEMENT OF THE CASE

The Kiowa Tribe of Oklahoma ("Kiowa" or the "Tribe") is a federally recognized Indian tribe. Under federal law, federally recognized Indian tribes have sovereign immunity to damage suits, absent Congressional authorization or a waiver by the tribe.

In 1990, the Tribe purchased from Manufacturing Technologies, Inc. ("Manufacturing") a portion of the shares of stock of an Oklahoma business corporation called Clinton-Sherman Aviation, Inc. The Tribe gave its promissory note as consideration for the purchase of the shares.

The Tribe did not waive its immunity to damage suits or otherwise consent to be sued in any court. Instead, the Tribe expressly reserved its sovereign rights. The promissory note states:

Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma. (R. at A, p. 3.)¹

The Tribe defaulted by failing to make scheduled note payments. Manufacturing sued the Tribe in the District Court of Oklahoma County, State of Oklahoma, seeking a money judgment.

The Tribe raised its federally recognized immunity to suit on a motion to dismiss. (R. at B.) Throughout the case, it consistently raised its sovereign immunity as a defense. The district court rejected the sovereign immunity defense and entered judgment against the Tribe for \$445,470.83, in principal and interest.

The Oklahoma Court of Appeals affirmed the trial court's judgment. It relied upon the Oklahoma Supreme Court's decisions in *Hoover v. Kiowa Tribe of Okla.*, 909 P.2d 59 (Okla. 1995) *cert. denied* ___ U.S. ___, 116 S.Ct. 1675, 134 L. Ed 2d 799 (1996) and *First Nat'l. Bank v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996) for the ruling that, if an Indian tribe engages in commerce outside Indian Country, then a state court has inherent jurisdiction over the tribe,

¹ References to ("R.") are to the record on appeal in *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, No. 86,489, the Court of Appeals of the State of Oklahoma.

unless that state court jurisdiction has been "ousted" by affirmative action of Congress.

REASONS FOR GRANTING THE WRIT

THE OKLAHOMA COURT OF APPEALS DECIDED AN ISSUE OF INDIAN TRIBAL SOVEREIGNTY IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND CONFLICTS WITH 'OVERRIDING' CONGRESSIONAL GOALS OF TRIBAL ECONOMIC DEVELOPMENT.

Commerce and relations with Indian tribes are the exclusive province of federal law. United States Constitution, Article I, sec. 8, cl. 3; Article 2, sec. 2; *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). States have been divested of virtually all authority over Indian commerce and Indian tribes. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. ___, 116 S.Ct. 1114, 1126, 134 L. Ed. 2d 252 (1996). The definition of Indian tribal sovereignty is also a matter of federal law. *Iowa Mutual Ins. Co. v. La Plante*, 480 U.S. 9, 107 S.Ct. 971, 975, 94 L.Ed.2d 10 (1987). This Court has repeatedly defined tribal sovereignty to include immunity from suit, absent Congressional or tribal consent. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). This Court relied upon long-established

traditional concepts of sovereignty to hold that consent alone creates jurisdiction over a sovereign. *United States v. Testan*, 424 U.S. 293, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). Without consent, any attempted exercise of judicial power over a tribal sovereign is void. *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940). There is no federal law to support Oklahoma's decision that it has "inherent jurisdiction" over an Indian tribe if the suit arises from commerce outside Indian Country and there has been no Congressional "ouster" of Oklahoma's jurisdiction.

Encouraging tribal self-government and economic development is an "overriding goal" of Congress. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1092, 94 L.Ed.2d 244 (1987). Tribal sovereign immunity is essential to promote the federal policies of fostering tribal self-determination and economic development. It allows tribes to regulate, by contract, the extent of economic risk assumed in commerce.

This Court's most recent case on tribal immunity to damage suits reiterated that, absent consent, a court has no jurisdiction over Indian tribes. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) the State of Oklahoma proposed that the immunity doctrine, as defined in *United States Fidelity & Guaranty* be abandoned or substantially modified. This Court refused "to modify the long-established principle of tribal sovereign immunity" in response to the Oklahoma Tax Commission's attempt to recover a money judgment against an Indian tribe.

In this case, the Oklahoma Court of Appeals did what this Court refused to do in *Citizen Band*. It re-makes basic federal law by ignoring both *United States Fidelity & Guaranty* and *Citizen Band* and refuses to recognize tribal sovereign immunity. The Oklahoma Court of Appeals' decision also ignores Congress' use of tribal sovereign immunity in pursuit of its overriding goal of promoting tribal self-government and economic development. Congress enacted a statutory scheme for federal Indian relations which specifically includes tribal immunity as a part of its policy. See 25 U.S.C. § 450N(1) (tribal immunity to suit expressly preserved).

The importance of requiring states to follow federal law on tribal sovereign immunity is fully understood when this case is considered against the backdrop arising from Kiowa's attempt to purchase all of the shares of Clinton-Sherman Aviation, Inc. This case is but one of many filed by various individuals or entities that were given Kiowa's promissory notes as consideration for the purchase of corporate shares of Clinton-Sherman Aviation, Inc. *In all of these notes, Kiowa specifically reserved its sovereign rights.* Despite the reservation of sovereign rights, the Oklahoma state courts assumed jurisdiction and entered judgments against Kiowa. These cases represent the first time that Oklahoma courts have concluded that it was proper to ignore an Indian tribe's federally recognized sovereign immunity to suit. See *Hoover*, 909 P.2d at 59; *Aircraft Equipment Co. v. Kiowa Tribe of Okla.*, 921 P.2d 359 (Okla. 1996); *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, No. 87,031, Supreme Court of

Oklahoma; *JB Investment Corp. v. Kiowa Tribe of Oklahoma*, No. 87,032, Supreme Court of Oklahoma.

The total judgments, including interest and attorney fees, exceed \$1,500,000.00. Admittedly, neither the judgments in the other cases nor the efforts to collect them are directly challenged in this case. Reviewing them, however, is helpful to understanding the impact of Oklahoma's decision to ignore federal law and disregard Kiowa's immunity to suit.

Attempts to collect these judgments generated a second wave of litigation between Kiowa and the judgment creditors. This wave of litigation shows that Oklahoma's destruction of Kiowa's sovereign immunity places federal Indian policy in the hands of the State of Oklahoma. In two instances, the judgment creditors used state court process to seize Kiowa's tribal tax revenues. See *Aircraft Equipment Co. v. Kiowa Tribe of Okla., et al.* No. 86,184, Supreme Court of Oklahoma [challenging seizure of severance tax revenues and enjoining enforcement of tribal tax laws]; *Aircraft Equipment Co. v. Kiowa Tribe of Okla.*, No. 85,272, Supreme Court of Oklahoma [challenging seizure of Kiowa's severance tax revenues through use of state court garnishment] As yet, the Oklahoma Supreme Court has not issued its opinion with respect to a state court's authority to seize tribal funds. But, the funds are being seized, as appeals await decision. These funds would have been used in Kiowa's self government. The loss of these funds necessarily reduces tribal governmental operations.

In two other cases, state court garnishments have been used to seize Kiowa's bank accounts, which hold tribal tax revenues, tribal funds paid to Kiowa by the United States pursuant to 25 U.S.C. § 1401 *et seq.* (Indian Tribal Judgment Funds Use or Distribution Act²) and 25 U.S.C. § 450 *et seq.* (Indian Self Determination And Education Assistance Act³) See *Robert M. Hoover, Jr. v. Kiowa Tribe of Okla. v. The First Nat'l. Bank of Mountainview, Okla., Garnishee*, No. CIV-96-1624-L, United States District Court for the Western District of Oklahoma (prior to removal, CJ-91-667 District Court of Oklahoma County, Oklahoma) and *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Okla. v. Anadarko Bank & Trust Co., Garnishee*

² 25 U.S.C. § 1401 regulates the use and distribution of funds appropriated in satisfaction of judgments of the Indian Claims Commission or the United States Court of Federal Claims in favor of Indian tribes. Pursuant to § 1403(b)(5), a "significant portion" of the funds are reserved for "common tribal needs, educational requirements and such other purposes as the circumstances of the affected Indian tribe may justify."

³ 25 U.S.C. § 450(a) declares federal policy to assure maximum Indian participation in the direction of educational as well as other federal services to Indian communities. Pursuant to the Act, the federal government contracts with tribes to administer various social programs. Federal funds are provided for tribal administration of these programs. This Act specifically preserves tribal sovereign immunity at § 450N(1).

No. CIV-96-2059-T, United States District Court for the Western District of Oklahoma (prior to removal, CJ-90-10166, District Court of Oklahoma County). Again, these are funds that were intended to run the Kiowa tribe. Their loss necessarily diminishes Kiowa's ability to function as a government.

Currently, over \$ 450,000.00 of Kiowa's tribal funds have been seized by state court process. The seized funds include federal monies allocated for a housing improvement program, food distribution and higher education. Of course, none of these funds can be used by the Tribe.

While these cases are ongoing, the Tribe sought protection from garnishment of its assets with its own suit for injunctive and declaratory relief in federal court. Kiowa asked the United States District Court for the Western District of Oklahoma to recognize its immunity to suit, as a matter of supreme federal law and stop the state court from seizing its tribal assets. The federal court refused to grant Kiowa a preliminary injunction and dismissed its suit on the basis of *Rooker/Feldman* abstention. The United States District Court ruled that Kiowa's sole remedy is to seek review by the United States Supreme Court under 28 U.S.C. § 1257.⁴ *Kiowa Tribe of Okla. v. Robert M. Hoover et al.*, CIV-96-0843, United States District Court for the Western District of Oklahoma [denial of preliminary injunction on appeal as *Kiowa Tribe of Oklahoma v. Robert M. Hoover, et al.*, No. 96-6278, United States Court of Appeals for the

⁴ The text of the Order is reproduced in the Appendix.

Tenth Circuit; dismissal of Kiowa's case on appeal as *Kiowa Tribe of Okla. v. Robert M. Hoover et al.*, No. 96-6401, United States Court of Appeals for the Tenth Circuit].⁵

The Tenth Circuit, when asked to stop seizure of Kiowa's assets with an injunction pending appeal, refused the request with the observation that, "This case involves ongoing state court proceedings and should remain in that forum." Order of October 10, 1996, issued in *Kiowa Indian Tribe of Okla. v. Hoover, et al.*, No. 96-6278, United States Court of Appeals for the Tenth Circuit.

Thus, Kiowa is in the difficult position of having state courts refuse to honor its federally recognized immunity to suit and seize its funds used run the tribal government, while the United States District Court and the Tenth Circuit abstain from jurisdiction, suggest that the matter remain in state court and refer Kiowa to this Court as its sole remedy. The suggestion that Kiowa continue legal resistance in state court may be an attractive alternative to federal interference with state court judgments. It may be particularly attractive to a federal court that expects a state court to realize that states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla.*, 116 S.Ct. at 1126. But, it is a suggestion that is blind to the reality of Oklahoma's position.

Kiowa has no hope of the Oklahoma Supreme Court concluding that it does not, in fact, have "inherent

⁵ The text of the Order is reproduced in the Appendix.

jurisdiction" over an Indian tribe. The Oklahoma Supreme Court makes it obvious and certain that it believes it has "inherent jurisdiction" over an Indian tribe. *Hoover*, 909 P.2d at 62; *First Nat'l. Bank*, 913 P.2d at 300; *Aircraft Equipment Co.*, 921 P.2d at 361. Oklahoma has gone so far as to declare this issue a "state law question" and to conclude that its position was vindicated by this Court's denial of certiorari in *Hoover*. *Aircraft Equipment Co.*, 921 P. 2d at 361. At best, Kiowa can hope only that Oklahoma will conclude that it cannot seize tribal assets and thereby cripple tribal government. But, if Oklahoma is willing to render a judgment against an Indian tribe, will Oklahoma likely next say that its judgment cannot be enforced?

Further, in deciding whether to grant a certiorari writ, it might appear attractive to await the results of Kiowa's own suit in federal court. But, that is an idea that requires both time and events to await a long court process that may yield no relief when it does act. The United States District Court has already refused to take jurisdiction and the Tenth Circuit says that the matter should be left to the state courts. It will be difficult at best for Kiowa to obtain a reversal of an abstention ruling by securing a decision from the Tenth Circuit, which already stated that the matter should remain in state court. In the event that Kiowa should succeed in the Tenth Circuit, then the best it can hope for is to be remanded for further proceedings before the District Court. In the meantime, Kiowa's government must function on a daily basis. It cannot go on "hold" while the court process continues. The programs it runs are designed to meet the daily needs of tribal members.

Admittedly, from this mare's nest of litigation, Kiowa could eventually emerge with a ruling from the Oklahoma Supreme Court that Oklahoma must respect Kiowa's tribal treasury. Possibly, Kiowa may eventually secure from the Tenth Circuit or the United States District Court a ruling that limits Oklahoma to its proper Constitutional powers. But, it is not necessary to consign Kiowa to the task of battling an array of intense state and federal litigation that drains its coffers and paralyzes its government. All Kiowa asks is that Oklahoma respect the sovereign immunity this Court has regularly and clearly recognized.

Stated strictly in legal terms, the State of Oklahoma refuses to recognize Constitutional limitations upon its power over Indian tribes. It plainly ignores federal law that provides that an Indian tribe is not subject to the jurisdiction of a state court, unless either the tribe or Congress has authorized that state jurisdiction. But, stating the issue as a legal problem drains the issue of the urgency that is gained from the press of daily reality. The problem is that Oklahoma, having declared its own jurisdiction over a federally recognized Indian tribe and having started seizing tribal funds to satisfy judgments, is denying to the tribe the money it uses for self-government. In fact, Oklahoma is seizing federal funds appropriated for tribal self-government. When the tribe loses its tax revenues, its federal judgement funds and its federal self-determination funds, the tribe loses its capacity to function as a sovereign entity. This result is destructive of Congress' overriding goal of encouraging tribal self-government.

Oklahoma has thirty-six federally recognized Indian tribes within its borders, and thus, Oklahoma's new position on Indian sovereignty involves tribes other than Petitioner. Many of these thirty-six Indian tribes will find that virtually all of their commerce must necessarily occur, at least in part, outside tribal territory. This is because, in many instances, tribal territory is either too small or too remote to be conducive to commerce that can remain exclusively within tribal territory. As a practical matter, many tribes cannot engage in any commerce completely upon tribal territory and, as a result, those tribes may lose all immunity.

Doubtlessly, Oklahoma is significantly troubled by the chore of running a state government and making the unique concessions it must make to accommodate federal Indian tribe policy. But, Oklahoma's frustration cannot be allowed to boil over to the point that Oklahoma can ignore Constitutional limits on its powers and eliminate an essential element of federal policy. A doubtful determination of an important question of state power over Indian affairs is reason for granting certiorari. *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

**THERE IS A CONFLICT BETWEEN A
DECISION OF THE OKLAHOMA
COURT OF APPEALS AND A DECISION
OF THE COURT OF APPEALS FOR THE
TENTH CIRCUIT ON THE ISSUE OF
TRIBAL IMMUNITY TO DAMAGE
SUITS.**

The Tenth Circuit recognizes that, as a matter of federal law, an Indian tribe is immune to damage suits, absent a clear waiver by the tribe or Congressional abrogation. *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166 (10th Cir. 1992). This holding is consistent with a long line of decisions by this Court. *Santa Clara Pueblo*, 98 S.Ct. at 1677; *United States Fidelity & Guaranty Co.*, 60 S.Ct. at 656.

Recently, the Tenth Circuit held that, in the absence of tribal or Congressional waiver of immunity, tribal immunity to damage suits applied to a tribe's conduct of commerce outside of tribal territory. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995) *cert. denied* ___ U.S. ___, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). In so doing, the Tenth Circuit addressed a question raised in the *Citizen Band* concurring opinion as to whether a tribe's immunity is limited by geographical boundaries. *Citizen Band*, 111 S.Ct. at 912. The Tenth Circuit answered the question in a manner consistent with long established, clearly articulated precedent from this Court. It found there was no geographical limit to the nature of a sovereign.

In this case, the Oklahoma Court of Appeals also answered the question of whether tribal immunity has geographical limits. Despite *Hanson* and a legion of cases from this Court, the Oklahoma Court of Appeals reached the opposite conclusion. It held that tribal immunity does not apply to a damage suit arising from a tribe's conduct of commerce outside tribal territory. The absence of the federally required waiver of immunity, and the presence of an express reservation of sovereign rights, were immaterial.

The Oklahoma Court of Appeals' decision and the decision of the Tenth Circuit are in direct conflict. Either court would have decided the other court's case in an exactly opposite way.

This direct conflict is particularly acute because it raises the question of whether state judicial power concerning tribal immunity is limited by federal law. *Hanson*, in which a federal court enjoined a state trial court from exercising jurisdiction over a tribe, makes plain the extent of the problem of this conflict. Unless there is resolution of these two conflicting decisions, tribes that wish to protect their federally recognized rights will be forced to seek federal court relief. If the District Court for the Western District of Oklahoma is correct about its lack of power to protect Indian tribes' federal rights, that relief can come only from this Court acting under 28 U.S. C. § 1257. With thirty-six federally recognized Indian tribes in Oklahoma, more cases are bound to follow.

It is not desirable to allow this conflict to continue unresolved and generate a series of federal suits and petitions

for certiorari. This Court should grant certiorari to provide a resolution of this conflict for both the Oklahoma Court of Appeals and the Court of Appeals for the Tenth Circuit.

**THE OKLAHOMA COURT OF APPEALS
DECIDED A QUESTION OF TRIBAL
SOVEREIGN IMMUNITY WHICH HAS
NOT, BUT SHOULD BE, DECIDED BY
THE SUPREME COURT.**

If there are to be geographical limits on tribal immunity and an expansion of state authority over Indian tribes, then those changes should come from this Court or from Congress, not from state courts declaring their own powers. Such a change should come from the federal government because commerce with Indian tribes and definition of the nature of tribal sovereignty are matters of federal law. United States Constitution Art. 1, sec. 8, cl. 3; *La Plante*, 107 S.Ct. at 975.

Review of this case presents the opportunity to set a clear uniform precedent and allow tribes, persons engaging in commerce with tribes, and states to understand the nature and extent of their rights and powers.

CONCLUSION

For the reasons above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

**NOT FOR PUBLICATION
THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA**

DIVISION I

MANUFACTURING TECHNOLOGIES,)	
INC., an Oklahoma Corporation,)	
)
Appellee,)	
)
vs.)	Case #86,489
)
KIOWA TRIBE OF OKLAHOMA,)	
)
Appellant.)	

**APPEAL FROM THE DISTRICT COURT
OF OKLAHOMA COUNTY, OKLAHOMA**

HONORABLE LEAMON FREEMAN, JUDGE

AFFIRMED

R. Brown Wallace, Oklahoma City, Oklahoma	For Appellant
John E. Patterson, Oklahoma City, Oklahoma	For Appellee

MEMORANDUM OF OPINION

Opinion by Carl B. Jones, Judge:

This appeal presents an issue of Indian tribal sovereignty - does a state court have jurisdiction to hear a claim and enter a judgment for damages against a federally recognized Indian tribe which has not waived its sovereign rights. The answer under these facts is yes.

This was suit upon a note. Appellant, Kiowa tribe, executed a promissory note to Appellee in the principal amount of \$285,000.00 to finance tribe's purchase of stock in another corporation, Clinton-Sherman Aviation, Inc. Payment was not made as required by the note, resulting in this action for the principal amount of \$285,000.00, and the accrued interest. Appellee filed a motion for summary judgment. Appellant tribe responded to the motion for summary judgment, admitting that the note was in default. Tribe only objected to the motion for summary judgment on the ground that it is a federally recognized Indian tribe, that it had not waived its sovereign immunity, and that it was therefore immune from damage suits in state courts. Summary judgment was granted to Appellee in the requested amount of \$285,000.00, and accrued interest in the amount of \$160,470.83. Subsequently, Appellee was awarded an attorney fee in the amount of \$7,185.00 and costs of \$94.00. Tribe appeals the award of attorney fees on the same grounds as its appeal of the underlying judgment.

For purposes of the motion for summary judgment, the facts were undisputed. The issue here is one of law.

This appeal has been perfected under the accelerated procedures of Rule 1.203(A), Rules for Appellate Procedure in Civil Cases, 12 O.S. Supp. 1993, Ch. 15, App. 2.

Our Supreme Court has recently decided two similar cases, both involving the Kiowa tribe, which are dispositive of the issue here. In *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996), the tribe had executed a promissory note to Appellant secured by 5,000 shares of stock in Clinton-Sherman Aviation, Inc. The tribe defaulted and the stock was sold at auction. Appellant's lawsuit followed, presumably for a deficiency judgment. The trial court granted tribe's motion to dismiss, finding that having not been waived, the doctrine of sovereign immunity applied, and concluding that the state court was without jurisdiction. The Oklahoma Supreme Court reversed, finding persuasive the reasoning of the New Mexico Supreme Court in *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied*, 490 U.S. 1029, 109 S.Ct. 1767 (Because the policy of New Mexico allowed breach of written contract actions against the state, state courts may exercise jurisdiction over an Indian tribe engaged in off-reservation activities for breach of contract.) *Hoover* points out that Oklahoma, like New Mexico, permits breach of contract suits against the state. *Hoover*, 909 P.2d at 62. It accordingly holds that because this litigation was not expressly prohibited by Congress and does not infringe on tribal self-government, contracts between and Indian tribe and a non-Indian may be enforced in state court.

Regarding the applicability of *Hoover*, Appellee tribe only argues that the opinion's reliance on the New Mexico *Padilla* case is flawed because a New Mexico Court of Appeals decision, *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. Ct. App. 1995) has criticized it. Regardless of criticism, *Padilla* is still the law in New Mexico and *Hoover* is now the law in Oklahoma. This Court will not presume to second guess the reasoning of our Supreme Court.

An even more recent decision in this state reaffirming its holding in *Hoover* is *First Nat'l Bank in Altus v. Kiowa, Comanche, and Apache Intertribal Land use Committee*, 913 P.2d 299 (Okla. 1996). The court there answered affirmatively the question of "... whether a contract between a tribal enterprise engaged in commercial activity outside Indian county and a non-Indian may be enforced in state court."

As the law now exists in Oklahoma, there appears no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding. The underlying judgment is accordingly affirmed. Likewise, the order awarding attorney fees and costs to Appellee is affirmed for the same reasons.

AFFIRMED.

GARRETT, J., and JOPLIN, J., concur.

UNITED STATES COURT OF APPEAL
FOR THE TENTH CIRCUIT

KIOWA INDIAN TRIBE OF)	
OKLAHOMA, a federally)	
recognized Indian Tribe,)	
)	
Plaintiff-Appellant,)	
)	
vs.)	No. 96-6278
)	
ROBERT M. HOOVER, JR., an)	
individual; AIRCRAFT EQUIPMENT)	
COMPANY, a joint venture formed)	
under the laws of Oklahoma;)	
JOHN M. AMICK, in his capacity)	
as a District Judge, State of)	
Oklahoma; JAMES B. BLEVINS, in)	
his capacity as a District Judge,)	
State of Oklahoma,)	
)	
Defendants-Appellees.)	

ORDER

Before TACHA, BALDOCK, and MURPHY, Circuit Judges

This matter is before us for consideration of appellant's request for a preliminary injunction to Fed. R. App. P. 8, pending appeal of the district court's denial of a preliminary injunction. Following a hearing, the district court denied injunctive relief based on appellant's failure to demonstrate irreparable harm.

The grant or denial of an injunction is within the trial court's discretion, see Tri State Generation v. Shoshone River Power, Inc., 805 F.2d 351, 354 (10th Cir. 1986), and this court may set aside its denial only for error of law, abuse of discretion, and clear error in factual findings. Autoskill Inc. v. National Educ. Support Sys., Inc., 994 F.2d 1476, 1487 (10th Cir.), cert. denied, 114 S. Ct. 307 (1993). The elements to be demonstrated before the district court in considering a preliminary injunction are the same as those for a stay. To be entitled to a stay pending appeal, an appellant must show (1) the likelihood of success on the merits on appeal; (2) irreparable harm to the appellant if the stay is not granted; (3) other parties will not be substantially harmed by the entry of stay; and (4) the public interest favors a stay. See Hilton v. Baunskill, 481 U.S. 770, 776 (1987); United States v. Various Tracts of Land in Muskogee & Cherokee Counties, 74 F.3d 197, 198 (10th Cir. 1966); see also 10th Cir. R. 8.1.

We have evaluated appellant's application under the four-part test and have determined it has failed to meet the required criteria. In particular, the claims of the likelihood of success on the merits and irreparable harm are insufficient to warrant the relief sought.

This case involves ongoing state court proceedings and should remain in that forum.

Accordingly, the application for injunction pending appeal is denied.

Entered for the Court
PATRICK FISHER, Clerk

By _____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

KIOWA INDIAN TRIBE OF)	
OKLAHOMA, a federally)	
recognized Indian Tribe,)	
)	
Plaintiff,)	
)	
vs.)	No. CIV-96-843-C
)	
ROBERT M. HOOVER, JR., an)	
individual, et al.)	
)	
Defendants.)	

MEMORANDUM OF OPINION

This matter comes before the Court on the motion of defendants, Robert M. Hoover, Jr. and Aircraft Equipment Co. to dismiss the claims of plaintiff, The Kiowa Tribe of Oklahoma (the Tribe). Defendants challenge plaintiff's claims and this Court's jurisdiction asserting that plaintiff seeks relief which is barred by the federal Anti-Injunction Statute, 28 U.S.C. § 2283, and that plaintiff is improperly asking this Court to sit in an appellate capacity contrary to the Rooker-Feldman abstention doctrine. The court also

concludes that the Younger abstention doctrine is implicated by the facts and procedural history of this case.

I. Background

The case before this Court following extensive state court and tribal court litigation in which plaintiff, a federally recognized Indian tribe, was found liable to defendants, Robert Hoover and Aircraft Equipment Company, for defaulting on its obligation under a promissory note. At all states of the litigation, the Tribe has raised the defense of sovereign immunity to the claims of its creditors.

In the initial case at the state court level (the Hoover Litigation) Robert Hoover filed suit against the Tribe for damages arising out of the Tribe's failure to honor the promissory note. Defendant Oklahoma District Judge James Blevins presided over this litigation. The second case (the Aircraft Equipment Litigation) also concerned the same note as the Hoover Litigation, but in this case, Aircraft alleged that the Tribe's failure to pay Hoover was a breach of an assumption agreement between Aircraft and the Tribe. Defendant Oklahoma District Judge Ricks presided over those proceedings. These cases ultimately resulted in two opinions from the Supreme Court of Oklahoma wherein that court rejected the notion that Indian tribes possess sovereign immunity when engaging in off-reservation commercial activities. Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma, 921 P.2d 359 (Okla. 1996); Hoover v. Kiowa Tribe of Oklahoma, 909 P.2d 59 (Okla. 1995), cert. denied, --- U.S. ---, 116 S.Ct. 1675 (1996). These opinions, however, are in direct conflict with precedent from the

United States Court of Appeals for the Tenth Circuit. Sac and Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995), cert. denied, --- U.S. ---, 116 S.Ct. 57 (1995) (tribal sovereign immunity extends to off-reservation commercial activities).

Following remand to the state trial courts, judgments were entered on behalf of Aircraft and Hoover. Aircraft then instituted garnishment proceedings against the Tribe and has seized tribal revenues for oil and gas severance taxes to satisfy its judgment. In addition, Aircraft has sought a creditor's bill in state court against the Tribe and various oil and gas companies. Defendant Oklahoma District Judge Amick granted the request for the creditor's bill and ordered oil and gas companies to pay any severance tax owing to the Tribe to the Oklahoma County Clerk pending the outcome of plaintiff's appeal of the ruling on the creditor's bill still pending before the Oklahoma Supreme Court. Judge Amick also issued an order enjoining the Tribe from enforcing any tribal tax laws which allow foreclosure on tax liens created by the failure of oil and gas companies to pay severance tax to the Tribe.

Plaintiff's present action is based upon 42 U.S.C. § 1983 alleging that these actions of the State of Oklahoma, Robert Hoover and Aircraft Equipment have violated plaintiff's federal sovereign immunity rights. The Tribe contends that it is therefore entitled to injunctive relief against the state court judges and monetary damages as reimbursement for the revenues it contends it lost as a result of the wrongful actions perpetrated by defendants Hoover

and Aircraft. Plaintiff also seeks punitive damages from Hoover and Aircraft.

II. Discussion

The defendants' motion to dismiss attacks plaintiff's claim for relief asserting that this Court does not have jurisdiction because it cannot decide plaintiff's claims without sitting in appellate review of Oklahoma state courts, and that the complaint seeks an injunction that is barred by the Anti-Injunction Act, 28 U.S.C. § 2283. In addition, the United States Court of Appeals for the Tenth Circuit has recently ruled federal courts have the responsibility to raise, sua sponte, the Younger abstention doctrine when applicable. The Court finds that doctrine is also implicated in the present case. Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996); see also, Penzoil v. Texaco, 481 U.S. 1 (1987) (Younger abstention applicable when federal injunction sought against state attempt to enforce state judgment). Nonetheless, because the Court finds that plaintiff's claims constitute an improper attempt to seek review of state court judgments through federal district court, defendants' motion to dismiss must be granted. Therefore, the Court will not address the issues raised by the Younger doctrine and the Anti-Injunction Act.

Federal district courts do not have authority to review final judgments of a state court in judicial proceedings. Federal review of state judicial proceedings is only available from the United States Supreme Court. 28 U.S.C. § 1257; see District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S.

413 (1923). The United States Supreme Court has held that this nondiscretionary rule, the Rooker-Feldman doctrine, prohibits district courts from exercising jurisdiction over cases where the claims are "inextricably intertwined" with the decision of the state court, even if the complaint alleges the state court acted unconstitutionally.* Feldman, 460 U.S. at 486-87; see Facio v. Jones, 929 F.2d 541 (10th Cir. 1991); Van Sickle v. Holloway, 791 F.2d 1431, 1436 (10th Cir. 1986).

Plaintiff asks this Court to do what the Rooker-Feldman doctrine specifically prohibits -- revisit the legal conclusions of the Supreme Court of Oklahoma in Hoover and Aircraft Equipment. Plaintiff is correct that this Court has jurisdiction to hear section 1983 claims. However, "[t]he casting of a complaint in the form of a civil rights action cannot circumvent th[e Rooker-Feldman] rule." Liedtke v. State Bar of Texas, 18 F.3d 315 (5th Cir. 1994) cert. denied, -- U.S. --, 115 S.Ct. 271 (1994); see also Facio, 928 F.2d at 522-24; Van Sickle, 791 F.2d at 143. Plaintiff's complaint illustrates that its arguments in the present case and its arguments before the Oklahoma courts are indistinguishable. The factual support for plaintiff's action is entirely reliant upon the substance of the decisions

* Although plaintiff argues that the state courts' rejections of its claims of sovereign immunity rise to the level of a constitutional violation, the Court does not decide whether that characterization is accurate. See Sac and Fox Nation, 47 F.3d at 1064-65 (accepting Ninth Circuit's reading of historical foundation of sovereign immunity); In re Greene, 980 F.2d 590, 594-96 (9th Cir. 1992), cert. denied sub nom., Richardson v. Mt. Adams Furn., 510 U.S. 1039 (1994) (tribal sovereign immunity based upon two hundred years of federal common law).

of the Oklahoma Supreme Court and resulting lower court decisions on remand. (Compl. at 3-6). The complaint is, in essence, an invitation to this Court to apply the ruling of the Tenth Circuit in Sac and Fox Nation, 47 F.3d at 1064-65, to overturn the decisions of the Supreme Court of Oklahoma which specifically rejected the Tenth Circuit's reasoning therein. Therefore, the Court rules that plaintiff's complaint is "inextricably intertwined" with the state court decisions and must be dismissed for lack of jurisdiction pursuant to the Rooker-Feldman doctrine.

The motion presently under consideration was filed only by defendants Hoover and Aircraft Equipment, while defendants Judges Amick, Blevins and Ricks chose not to join in the motion. Nevertheless, plaintiff's claims against the judicial defendants are no different than those against the private defendants, with the exception that plaintiff does not seek monetary damages from the judges. Therefore, as the basis for dismissal under the Rooker-Feldman doctrine is jurisdictional, and plaintiff's claims against defendants Amick, Blevins and Ricks are "inextricably intertwined" with the state court decisions referenced above, the Court must also dismiss the action in regard to those defendants as well.

III. Conclusion

In conclusion, the Court grants defendants' motion to dismiss. Plaintiff's complaint against the private and judicial defendants is an effort to have the court review the judgment of the Supreme Court of Oklahoma -- an endeavor beyond this Court's jurisdiction. Therefore, plaintiff's complaint is dismissed as to all defendants.

IT IS SO ORDERED this ____ day of November,
1996.

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

KIOWA INDIAN TRIBE OF)
OKLAHOMA, a federally)
recognized Indian Tribe,)
)
Plaintiff,)

vs.)

No. CIV-96-843-C

)
ROBERT M. HOOVER, JR., an)
individual, et al.)
)
Defendants.)

JUDGMENT

Upon consideration of the pleadings herein, and as explained in the Memorandum Opinion entered this date, the Court finds that the motion to dismiss of defendants Robert M. Hoover, Jr. and Aircraft Equipment Co. should be granted, and this action is dismissed in its entirety.

DATED this ____ day of November, 1996.

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

2
No. 96-1037

Supreme Court, U.S.

FILED

FEB 8 1997

CLERK

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

vs.

MANUFACTURING TECHNOLOGIES, INC., an Oklahoma
corporation,

Respondent.

*On Petition for a Writ of Certiorari to the Court of
Appeals, Division I, for the State of Oklahoma*

RESPONDENT'S BRIEF IN OPPOSITION

JOHN E. PATTERSON, JR.

Counsel of Record

Attorney for Respondent

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QUESTION PRESENTED

Is an Indian Tribe immune from suit arising out of default on a promissory note given to secure economic development outside of tribal territory?

STATEMENT OF INTERESTED PARTIES

Respondent, Manufacturing Technologies, Inc., does not have a parent company and has no wholly owned subsidiaries.

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<i>Yee v. Escondido</i> , 503 U.S. 519 (1992)	8

Respondent requests that the Court deny the Petition for Writ of Certiorari filed by Petitioners and submits the following in Response:

STATEMENT OF THE CASE

The Promissory Note (the "Note") sued on was given by Petitioner as consideration for the purchase of shares of stock of Clinton-Sherman Aviation, Inc., an Oklahoma business corporation, from Respondent.

The Note was executed and delivered to Respondent in Oklahoma City and performance (payment) was to be made to Respondent at its business address in Oklahoma City. The sole reason for acquisition of the stock of Clinton-Sherman Aviation, Inc., was for business development for the Petitioner.

No payments were ever made by Petitioner on the Note. Suit was filed by Respondent in the District Court for Oklahoma County. Petitioner asserted that it was immune from suit because of its sovereignty. Judgment was rendered in favor of Respondent. The Oklahoma Court of Appeals, Division 1, affirmed the Judgment of the Trial Court, and the Oklahoma Supreme Court denied certiorari to Petitioner.

REASONS FOR DENYING THE WRIT

I.

THE OKLAHOMA COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT RESTRICTING TRIBAL IMMUNITY FROM SUIT FOR COMMERCIAL ACTIVITIES CONDUCTED OUTSIDE TRIBAL LANDS.

Petitioner claims tribal immunity to suit unless such immunity is waived by the Tribe or Congress has authorized

such suit. This claim is unduly broad, is in conflict with the decisions of this Court, and is not applicable in this case.

Mr. Justice Frankfurter reviewed the evolution of retention of federal authority over Indian Lands and activities in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). He states, at pages 72, 74, 75:

The general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia*, 6 Pet 515, 561, 8 L. Ed. 483; 501; . . . that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations a distinct nation. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. . . .

The applicability of state law, we there said, [*Williams v. Lee*, 358 U.S. 217, 795 S. Ct. 269, 3 L. Ed. 2d 251] depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. . . .

But State regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the

factor found decisive in *Williams v. Lee*, 358 U.S. 217.

This Court considered the right of New Mexico to tax a tribal business enterprise conducted off reservation in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The Court says, at pages 148, 149, 156:

But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, *supra*, 369 U.S. at 75, 82 S. Ct. at 571, 7 L. Ed. 2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398, 88 S. Ct. 1725, 20 L. Ed. 2d 689 (1968); *Organized Village of Kake*, *supra*, 369 U.S. at 75-76, 82 S. Ct. at 570-571, 7 L. Ed. 2d 573; *Tulee v. Washington*, 315 U.S. 681, 683, 62 S. Ct. 862, 863, 86 L. Ed. 1115 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 48 S. Ct. 333, 72 L. Ed. 709 (1928); and *Ward v. Race Horse*, 163 U.S. 504, 16 S. Ct. 1076, 41 L. Ed. 244 (1896). That principal is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, *supra*, at 516, 16 S. Ct. at 1080, 41 L. Ed. 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, *supra*.

This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . . Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by § 476 and 477 of the (Indian Reorganization) Act. (citations omitted) These provisions are designed to encourage tribal enterprises "to enter the white world on a footing of equal competition." . . . In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in §465 does not encompass or bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that the Tribe's ski resort is subject to that tax. . . .

The Kiowa Tribe entered into an agreement to purchase the capital stock of Clinton Sherman Aviation, Inc., from Respondent, and gave in consideration its Promissory Note. This transaction was a commercial venture and did not relate to tribal lands, or ventures conducted on tribal lands. Respondent submits that Petitioner is subject to "non-discriminatory state law otherwise applicable to all citizens of the state." *Mescalero Apache Tribe*, 411 U.S. at 148, 149.

Mr. Justice Stevens, especially concurring in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 515 (1991) says:

. . . I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U.S.C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state. . .).

The New Mexico Supreme Court has so held in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029. In that case the New Mexico Supreme Court held that the Pueblo was not immune from suit in state court brought by a contractor for work done on an off-reservation location.

The Oklahoma Supreme Court relied on *Padilla v. Pueblo of Acoma*, *supra*, in determining the right of the tribe to claim immunity in its off-reservation economic activities in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S. Ct. 1675. At page 62:

The New Mexico Court held that the exercise of jurisdiction over a sovereign Indian tribe for off-reservation conduct was solely a matter of comity. That court reasoned that since it was the policy of New Mexico to allow breach of written contract actions against the state, the district court may exercise jurisdiction over an Indian tribe engaged in activity off of the reservation for breach of contract. The New Mexico court cited *Nevada v. Hall*, 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979) for the

proposition that even though a sovereign may not be sued in its own courts without its consent, that doctrine does not necessarily support a claim of immunity in another sovereign's courts. The Supreme Court of the United States held that there was no constitutional provision that prohibits a state's exercise of jurisdiction over sovereign sister state. *Nevada*, 440 U.S. at 426, 99 S.Ct. at 1191. "Therefore, the policy of a state to refrain from the exercise of jurisdiction over a sister state is solely a matter of comity." *Padilla*, 754 P.2d at 850. . . .

Since Oklahoma also permits an action for breach of contract against the State, the Oklahoma Supreme Court found the reasoning of the New Mexico court persuasive, and found the Kiowa Tribe liable for suit in state court on a promissory note in an economic development transaction.

Cases cited by Petitioner, such as *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), an action brought by a tribal member against the tribe to determine tribal membership, clearly fall within the claim of tribal sovereign immunity.

It is clear that the State of Oklahoma has jurisdiction over the Indian tribe and over the subject matter of the action. There is no need for an express waiver of immunity from suit when the Tribe engages in an off-reservation commercial venture.

II.

THE TRIBE SUBJECTED ITSELF TO NON-DISCRIMINATORY STATE LAW APPLICABLE TO ALL CITIZENS WHEN IT WENT OUTSIDE TRIBAL LANDS IN A COMMERCIAL VENTURE.

This Court has, in the recent case of *United States v. Winstar Corporation*, __ U.S. __, 116 S. Ct. 2432 (1996) reviewed the questions of waiver of governmental immunity and the enforceability of contractual obligation of governmental entities engaging in commerce. In that case the Court held enforceable a contract entered into by a governmental entity, even though the entity was later barred from honoring its agreement by a regulatory change.

The Court considered the application of the "unmistakability doctrine," which holds that the contract with a governmental entity remains subject to sovereign jurisdiction unless such sovereignty is surrendered in unmistakable terms. The Court says, at page 2464:

An even more serious objection is that allowing the Government to avoid contractual liability merely by passing any "regulatory statute," would flaunt the general principle that, "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.

Mr. Justice Breyer, in his concurring opinion, states at page 2473:

The Court has often said, as a general matter, that the "rights and duties" contained

in a government contract "are governed generally by the law applicable to contracts between private individuals.

And further, at page 2473:

Murray v. Charleston, 96 U.S. 432, 445 (1878), "(a government contract "should be regarded as an assurance that [a sovereign right to withhold payment] will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity"); *New Jersey v. Yard*, 95 U.S. 104, 116-117(1877)

Petitioner complains that this case is but one of several in which judgment exceeding \$1,500,000 have been taken against the Tribe, and that collection of these judgments have resulted in the seizure of tribal funds. These issues are outside certiorari jurisdiction. The Court cannot consider issues outside those presented in the Petition for Certiorari. *Yee v. Escondido*, 503 U.S. 519, 535 (1992); Supreme Court Rule 14.1(a).

This issue was also addressed by Justice Breyer in *United States v. Winstar*, 116 S. Ct. at 2475, 2476. The government there argued that an award of damages against the government carries the danger that future regulatory actions will be deterred.

But this rationale has no logical stopping point. See, e.g., *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 24 (1977) ("Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes. . . .

Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts"). It is difficult to see how the Court could, in a principled fashion, apply the Government's rule in this case without also making it applicable to the ordinary contract case (like the hypothetical sale of oil) which, for the reasons explained above, are properly governed by ordinary principles of contract law. To draw the line - i.e., to apply a more stringent rule of contract interpretation - based only on the amount of money at stake, and therefore (in the Government's terms) the degree to which future exercises of sovereign authority may be deterred, seems unsatisfactory. As the Government acknowledges, see Brief for Petitioner 41, n. 34, this Court has previously rejected the argument that congress has "the power to repudiate its own debts which constitute 'property' to the lender, simply in order to save money." *Bowen, supra*, at 55 (citing: *Perry*, 294 U.S., at 350-351, and *Lynch*, 292 U.S., at 576-577).

The Petitioner complains that it will be forced to reduce tribal governmental operations if it is required to pay damages for its breached promises to pay. This argument is answered fully by *Winstar, supra*, and the cases cited there.

CONCLUSION

For the reasons cited herein, this Court should deny the writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
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No. 96-1037

In the Supreme Court of the United States

OCTOBER TERM, 1996

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF APPEALS

**BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE**

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26/2/97

QUESTION PRESENTED

Whether the sovereign immunity from suit accorded to Indian Tribes as a matter of federal law bars an action brought in state court to recover money damages for a breach of contract arising out of commercial activity undertaken by the Tribe outside Indian country.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1037

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Acting Solicitor General to express the views of the United States.

STATEMENT

1. The United States entered into its first treaty with the Kiowa Nation of Indians in 1837. 7 Stat. 533. Later treaties with the Kiowa were concluded in 1853 (10 Stat. 1013), 1865 (14 Stat. 717), and 1867 (15 Stat. 581, 589). Those treaties effectively recognized the Kiowa as a domestic dependent nation and established a relationship of trust and protection between the Tribe and the United States. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Indian tribes

"may * * * be denominated domestic dependent nations," whose "relation to the United States resembles that of a ward to his guardian"); cf. *Ex parte Crow Dog*, 109 U.S. 556, 571-572 (1883) (recognizing original status and rights of Indian Tribes). To this day, the United States continues to recognize the Kiowa Tribe of Oklahoma as having "the immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 61 Fed. Reg. 58,211, 58,213 (1996) (quoting 25 C.F.R. 83.2); see also 25 U.S.C. 479a, 479a-1.¹

In its 1867 treaties with the Kiowa, Comanche and Apache Tribes, 15 Stat. 581, 589, the United States set aside, from the original tribal lands, well over 2,000,000 acres as a permanent reservation for the Tribes. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (describing history). Through later shifts in law and policy, however, the United States largely abrogated those treaties, and divested the Kiowa Tribe of the majority of the reserved lands, in exchange for allotments of land to individual members of the Tribe and cash compensation to be held in trust for the Tribe by the United States. *Ibid.* We are informed that the Tribe today owns approximately 1,200 acres of land in Oklahoma, much of it in scattered parcels, as well as an interest in approximately 3,000 acres of land held by the United States in trust for the Kiowa, Comanche and Apache Tribes.

¹ We are informed that the Tribe presently has approximately 10,000 enrolled members, of whom a smaller number are actively involved in tribal affairs.

2. The record in this case is sparse. It appears that a tribal entity known as the Kiowa Industrial Development Commission entered into a letter agreement dated March 19, 1990, in which it agreed to purchase stock then held by respondent in an Oklahoma corporation known as Clinton-Sherman Aviation, Inc. See Pet. App. 2; Pet. on Prom. Note 1; Answer of Def. Kiowa Tribe 1; Def. Kiowa Tribe's Br. in Opp. to Pltf's Mot. for Summ. J. (Opp. Summ. J.) 1. On April 3, 1990, the then-Chairman of the Tribe's Business Committee signed, in the name of the Tribe, a short-term promissory note (the Note) promising to pay respondent \$285,000, with interest at an annual rate of 10% in the ordinary course and 15% after any default. Judgment 1 (Oct. 30, 1995); Note 1-2 (attached as Exh. A to Pet. on Prom. Note); Opp. Summ. J. 1.

The face of the Note indicates that it was signed at Carnegie, Oklahoma, where the Tribe maintains a Tribal Complex on land held in trust for the Tribe by the United States. Note 1-2; see Mot. to Dismiss 1. Respondent's petition seeking enforcement of the Note alleges (at ¶ 2), however, that the Note was "executed and delivered to [respondent] in Oklahoma City," and petitioner does not appear to have contested that allegation. Unless otherwise directed, payments were to be made at respondent's offices in Oklahoma City. Note 1. In a paragraph entitled "Waivers and Governing Law," the Note fails to specify a particular governing law, but it explicitly provides: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Note 2.

The Note called for only two payments, to be made 30 and 90 days after the Note was signed. Note 1. The Tribe did not make either payment. Judgment 1. It

further appears, from the decision in a related case, that a similar financial undertaking given by the Tribe in connection with the acquisition of additional shares of Clinton-Sherman Aviation was secured by the acquired shares, which subsequently proved to be worthless. Pet. App. 3; *Hoover v. Kiowa Tribe of Okla.*, 909 P.2d 59, 60 & n.3 (Okla. 1995), cert. denied, 116 S. Ct. 1675 (1996); see also *Aircraft Equip. Co. v. Kiowa Tribe of Okla.*, 921 P.2d 359, 360 & n.1 (Okla. 1996) (default by Tribe on assumption and guaranty of pre-existing promissory note).

3. Three years after payment was due, respondent sued the Tribe in state court seeking judgment on the Note. Pet. App. 2; Pet. on Prom. Note (filed Aug. 24, 1993). The Tribe moved to dismiss for lack of jurisdiction, in part on the ground that the Tribe had never waived its sovereign immunity from suit, and therefore could not be sued for money damages. See Pet. App. 2; Mot. to Dismiss 1. The court denied that motion (see Opp. Summ. J. 2 n.1), and the Tribe answered, again asserting its immunity from suit (Answer 2). The court granted respondent's motion for summary judgment, awarding respondent a total of \$445,471 in principal and accrued interest, together with attorneys' fees and costs. Judgment 1-2.

The Oklahoma Court of Appeals affirmed. Pet. App. 1-4. The court rejected the Tribe's sovereign immunity argument on the authority of *Hoover v. Kiowa Tribe of Oklahoma*, *supra*, and *First National Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (1996), in which the Oklahoma Supreme Court held that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." *Hoover*, 909 P.2d at 62.

In this case, the Oklahoma Supreme Court declined discretionary review. See Pet. 2.

DISCUSSION

In this and related cases, the courts of the State of Oklahoma have asserted jurisdiction over actions for money damages brought directly against an Indian Tribe. That assertion conflicts with decisions of this Court, the federal courts of appeals, and courts of last resort in other States. Review by this Court is necessary to resolve that conflict and to correct a serious error of federal law that fails to respect the sovereign status of Indian Tribes and threatens their economic well-being.

1. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), this Court reaffirmed that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." That statement reflects longstanding precedent. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991) ("We have repeatedly held that Indian tribes enjoy immunity against suits by States."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); see also *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890-891 (1986); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172-173 (1977); *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919); *Thebo v. Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895).

2. In this case, petitioner has not waived its tribal sovereign immunity. Indeed, the promissory note on which respondent sued explicitly provides that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Note 2. Nor has there been any suggestion that Congress has abrogated the Kiowa Tribe's immunity in any respect that is relevant to this case. Nonetheless, the state court of appeals held that "[a]s the law now exists in Oklahoma, there appears no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding." Pet. App. 4.

a. The court of appeals relied (Pet. App. 3) on the decision rendered by the Supreme Court of Oklahoma in a case with essentially identical facts, involving the Kiowa Tribe and arising out of the same transaction. *Hoover v. Kiowa Tribe of Okla.*, 909 P.2d 59, 60 & n.3 (1995), cert. denied, 116 S. Ct. 1675 (1996). In *Hoover*, the Oklahoma Supreme Court first noted that a state court has jurisdiction to consider the merits of a tribal sovereign immunity defense raised in litigation that is otherwise properly before the court. *Id.* at 61 (citing *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989)). The court then referred to its earlier decision in *Lewis v. Sac and Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (1994), cert. denied, 116 S. Ct. 476 (1995), which held (*id.* at 507-512) that the Oklahoma courts are generally empowered to decide civil cases arising within their territorial jurisdiction, whether those cases are governed by federal or state law. Although the *Lewis* court recognized that a special jurisdictional inquiry was appropriate "whenever Indian interests are tendered in a controversy," it held that "[o]nly that

litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance." *Id.* at 508.

Lewis did not address the question of sovereign immunity, which was not asserted before the state supreme court in that case. 896 P.2d at 506 n.15, 511 & n.59; *Hoover*, 909 P.2d at 61. In deciding that issue, *Hoover* cited approvingly the New Mexico Supreme Court's decision in *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850-851 (1988), cert. denied, 490 U.S. 1029 (1989), which held that a New Mexico court could decide a claim brought against a Tribe by a private party alleging a breach of contract in connection with off-reservation commercial activity undertaken by the Tribe. *Hoover* adopted *Padilla's* reasoning that a forum State's decision to recognize a Tribe's sovereign immunity from suit on claims arising within the usual territorial and subject-matter jurisdiction of the state courts was no different from the forum State's decision to accord another State immunity from claims arising out of activity undertaken by the other State within the forum State's territory. *Hoover*, 909 P.2d at 62; see *Padilla*, 754 P.2d at 850-851. Citing this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), *Padilla* held that that decision was "solely a matter of comity." 754 P.2d at 850. Because Oklahoma, like New Mexico, allows its courts to entertain suits against itself for breach of contract, *Hoover* concluded that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." 909 P.2d at 62.

b. The Oklahoma Supreme Court reaffirmed *Hoover* in *Aircraft Equipment Co. v. Kiowa Tribe of*

Oklahoma (Aircraft Equipment I), 921 P.2d 359 (1996), another case arising (like this case and *Hoover*) out of petitioner's purchase of the shares of Clinton-Sherman Aviation (see *id.* at 360 & n.1). The dissent in *Aircraft Equipment I* (*id.* at 362-363) argued that the court's position "contravene[d] the mainstream of contemporary sovereign immunity jurisprudence" and conflicted directly with decisions of two federal courts of appeals. Although the majority acknowledged a conflict with the Tenth Circuit's decision in *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, cert. denied, 116 S. Ct. 57 (1995), it dismissed that decision as "a federal court's pronouncement on a state law question" that "lacks the force of authority." *Aircraft Equip. I*, 921 P.2d at 361.

Pointing out that its decisions in *Lewis* and *Hoover* were based in large part on its reading of this Court's cases, the court in *Aircraft Equipment I* quoted the statement in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973), that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Aircraft Equip. I*, 921 P.2d at 361-362. The court concluded that "[h]aving cited those cases [in *Hoover*], and given the fact that the Supreme Court of the United States has chosen not to grant certiorari to review either the *Hoover* or *Lewis* opinions, [the court would] decline to follow the reasoning of the 10th Circuit." *Id.* at 362.

Finally, the Oklahoma Supreme Court recently upheld the right of Aircraft Equipment Co. to enforce its state judgment against petitioner using the remedies ordinarily available to judgment creditors in state court, including invoking state judicial power to

seize tribal tax revenues. *Aircraft Equip. Co. v. Kiowa Tribe of Okla.*, No. 86,184, (May 6, 1997). Finding "no merit to the Tribe's argument that *Lewis*, *Hoover*, and *Aircraft [Equipment] I* are contrary to federal law," slip op. ¶ 7, the court held (again over a dissent based on tribal sovereign immunity) that any burden on petitioner was "legally permissible where the Tribe ventured outside its Indian country, engaged in commercial activity for economic gain, and created a contract controversy which was ultimately settled in [state] court" (*id.* at ¶ 10). See also *First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299, 301 (Okla. 1996) (finding *Hoover* "dispositive of the question presented").

3. The state court of appeals was therefore correct to hold (Pet. App. 4) that it was required to assert jurisdiction over petitioner in this case, "[a]s the law now exists in Oklahoma." The Oklahoma rule cannot, however, be reconciled with this Court's cases concerning tribal sovereign immunity.

a. *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe* makes clear that tribal sovereign immunity bars an action for monetary relief, even if the action is based on a Tribe's commercial dealings with nonmembers. In *Potawatomi*, Oklahoma sought to recover \$2.7 million from the Citizen Band Potawatomi Indian Tribe for taxes on cigarettes sold to nonmembers by a store owned and operated by the Tribe. See 498 U.S. at 507. This Court held that the Tribe could be required to collect state taxes on future cigarette sales to nonmembers, but that tribal sovereign immunity barred a money judgment against the Tribe for unpaid taxes on past sales. *Id.* at 509-511, 514.

In *Potawatomi*, the Court specifically refused Oklahoma's invitation "to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity." 498 U.S. at 510. The State argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense," and that the doctrine therefore "should be limited to the tribal courts and the internal affairs of tribal government." *Ibid.* In rejecting that argument, the Court observed that Congress "has always been at liberty to dispense with * * * tribal immunity or to limit it," and "has occasionally authorized limited classes of suits against Indian tribes," but that it has never authorized actions to enforce tax assessments, and has "consistently reiterated its approval of the immunity doctrine." *Ibid.*² The Court concluded that, although

² Congress has provided for suits against Indian Tribes in connection with commercial activities under certain limited circumstances, which are not alleged to obtain in this case. In the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461 *et seq.*, Congress authorized most Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C. 476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). The Oklahoma Indian Welfare Act (OIWA), ch. 831, § 3, 49 Stat. 1967 (1936), authorizes Oklahoma Tribes to adopt constitutions and to receive corporate charters equivalent to those issued under the IRA. 25 U.S.C. 503. Charters of incorporation issued under Section 17 of the IRA often contain a clause expressly allowing the corporation to sue or be sued. Similarly, the OIWA authorizes any ten or more individual Oklahoma Indians to form a cooperative association chartered by the Secretary of the Interior, and the Act expressly provides that such an association "may sue and be sued" in state or federal court. 25 U.S.C. 504-505. Some courts have construed "sue or be sued" clauses in IRA charters to waive the

the State might have alternative methods of collecting the taxes at issue, there was "no doubt that sovereign immunity bar[red] the State from pursuing the most efficient remedy" by bringing suit directly against the Tribe. *Id.* at 514.

b. The Oklahoma Supreme Court's decisions denying immunity to petitioner rely heavily on the fact that the transaction giving rise to this litigation was evidently negotiated, and the relevant documents were allegedly signed, within the State's territorial jurisdiction and not on land held by or for the Tribe or its members. See, *e.g.*, *Hoover*, 909 P.2d at 61-62. This Court has previously refused to draw such a distinction for purposes of tribal sovereign immunity from suit. In *Puyallup Tribe, Inc. v. Department of Game*, a Tribe challenged a state court's judgment that asserted "jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation."

immunity of the incorporated entity from suit. See, *e.g.*, *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). Any such waiver is limited, however, to the business dealings and assets of the corporation, and does not extend to the Tribe in its sovereign capacity. See, *e.g.*, *Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982). Indeed, the absence of any similar authorization (by charter or statute) to sue the tribal governments organized under Section 3 of the OIWA (or Section 16 of the IRA) reinforces the conclusion that those governments remain protected by the established rule of sovereign immunity. In this case, the promissory note on which respondents sued was signed in the name of the Tribe by the chairman of its governing Business Committee, and there is no question of waiver because the Note specifically reserved the Tribe's "sovereign rights." Note 2; *Opp. Summ. J.* 1.

433 U.S. at 167. This Court held that a claim of sovereign immunity was "well founded" to the extent that it was "advanced on behalf of the Tribe, rather than the individual [Indian] defendants." *Id.* at 167-168; see *id.* at 172-173. Accordingly, the Court held that "the portions of the state-court order that involve[d] relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 173. In reaching that conclusion, the Court did not distinguish the Tribe's activities on reservation land from those occurring elsewhere, observing simply that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* at 172.

The Oklahoma Supreme Court relied on cases such as *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). See *Hoover*, 909 P.2d at 61 (quoting *Mescalero* and *Kake*); *Aircraft Equip. I*, 921 P.2d at 361-362 & n.2 (same). Those cases hold that a State may have authority to tax or regulate Tribes or individual Indians who engage in conduct (such as operating a ski resort, as in *Mescalero*, or fishing, as in *Kake*) within the State but outside Indian country. As *Potawatomi* makes clear (see 498 U.S. at 514), however, there is a difference between the right to demand compliance with state law and the means that may be available to enforce such compliance. Neither *Mescalero* nor *Kake* discusses enforcement, or mentions tribal immunity from suit. This Court's later decisions in *Potawatomi* and *Puyallup* address those issues, and they hold that neither a valid state tax nor a valid state fishing regulation may be enforced in a suit brought directly against an affected Tribe.

c. This Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), is not to the contrary. In that case, the California courts asserted jurisdiction over the State of Nevada, based on conduct by a Nevada agent within California's territorial jurisdiction. The Court noted that, in the absence of any other source of controlling federal law, any restriction on California's judicial power would have to be found in the federal Constitution. See *id.* at 414 & n.5. The Court held, however, that the constitutional compact generally leaves each State free to decide, as a matter of policy and comity, whether and on what terms to accord its sister States immunity from suit in its courts. *Id.* at 418-427.

Indian Tribes, however, "are not States, and the differences in the form and nature of their sovereignty make it treacherous" to reason too quickly by analogy. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15-20 (1831) (Tribes are neither "States" nor "foreign States" for purposes of Article III, but "may, more correctly, perhaps, be denominated domestic dependent nations"); compare *Blatchford*, 501 U.S. at 781-782 (a Tribe may not sue a State in federal court, as another State might do; the mutual cession of jurisdiction by the States to the federal sovereign does not apply to suits by or against Tribes, "as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties"). Unlike the two States involved in *Nevada v. Hall*, the State of Oklahoma and the Kiowa Tribe involved in this case are both subject to a body of federal constitutional, statutory, and common law that controls the question of tribal sovereign immunity.

As "domestic dependent nations" (*Potawatomi*, 498 U.S. at 509, quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17), the Tribes "occupy a unique status under our law" (*National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985)). See also, e.g., *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974); *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. at 512-513. Although the Tribes "retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America" (*National Farmers Union Ins. Cos.*, 471 U.S. at 851), their right to self-government "is ultimately dependent on and subject to the broad power of Congress" (*White Mountain Apache*, 448 U.S. at 143). See also, e.g., *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 787 n.30 (1984); *Wheeler*, 435 U.S. at 323. On the other hand, Congress has recognized that "the United States has a trust responsibility * * * that includes the protection of the sovereignty of each tribal government." 25 U.S.C. 3601(2).³ Consistent with that policy, Congress has not abrogated, but rather has confirmed, the sovereign immunity of Indian Tribes from suit. See 25 U.S.C. 450n (nothing in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, which establishes a

³ See also, e.g., Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(3), 110 Stat. 4017 (to be codified at 25 U.S.C. 4101(3)) ("[T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people.").

framework of financial assistance for Tribes, is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"). As a matter of both plenary power and special responsibility, the legal status of the Indian Tribes—including their immunity from suit—is a matter of federal law.

These bedrock principles of federal law, and the vesting of plenary power over Indian affairs in the United States rather than in the States, establish that the immunity of a Tribe from suit in state court is not a mere matter of "comity" for each State to decide, unlike in *Nevada v. Hall*.⁴ Congress could, of course, if it chose, render the Tribe amenable to suit in state court on commercial contracts signed outside of Indian country. But it has not done so. In the absence of affirmative congressional action, or consent by the Tribe, the rule of this Court's cases is that the Tribe is immune from suit for money damages.

4. As the Oklahoma Supreme Court has acknowledged (*Aircraft Equip. I*, 921 P.2d at 361-362), Oklahoma's assertion of jurisdiction over damage suits against petitioner arising out of its commercial activities outside Indian country conflicts directly with the Tenth Circuit's decision in *Sac and Fox Nation v. Hanson*. In *Hanson*, the federal court of appeals affirmed the entry of an injunction against Oklahoma state court proceedings that sought money damages or indemnification from an Indian Tribe on the basis

⁴ Similarly, the amenability of a foreign nation to suit in state court is a matter of federal law, to be determined by the political Branches in the exercise of their plenary powers over foreign affairs. See 28 U.S.C. 1604; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489, 493, 497 (1983).

of contractual and statutory claims arising out of a tribal business venture outside the Tribe's own territory. See 47 F.3d at 1065 ("Without an explicit waiver, the Nation is immune from suit in state court—even if the suit results from commercial activity occurring off the Nation's reservation.").⁵

Hanson is consistent with this Court's cases concerning tribal sovereign immunity, and with the decisions of most other appellate courts that have considered the matter of state-court jurisdiction over suits against Tribes. See *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290 (Minn. 1996) (immunity from damage suit arising from operation of casino, where alleged acts took place both within and outside Indian country), petition for cert. pending, No. 96-1215 (filed Jan. 29, 1997); *North Sea Prods., Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, 941 (Wash. 1979) (Tribe did not waive its immunity from state garnishment action by engaging in commercial conduct off the reservation); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423-424 (Ariz. 1968) (immunity from suit for damages arising from accident at

⁵ The state supreme court incorrectly characterized *Hanson* as "a federal court's pronouncement on a state law question." *Aircraft Equip. I*, 921 P.2d at 361. As we have explained, the question of tribal immunity from suit is one of federal law. The state court is generally correct, however, that it has concurrent (rather than subordinate) jurisdiction over many questions of federal law, including the question of state-court jurisdiction in the face of a claim of tribal immunity. See generally *Lewis*, 896 P.2d at 507-509; *Oklahoma Tax Comm'n v. Graham*, *supra*. That is why the conflict between the decisions is equivalent to a conflict in the courts of appeals for purposes of this Court's discretionary review. See *DeCoteau v. District County Court*, 420 U.S. 425, 430-431 (1975).

amusement park operated by Tribe outside its reservation); see also *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733, 735 (E.D. Tex. 1994) (immunity where officer of bank chartered and owned by Tribe allegedly defrauded plaintiff outside Indian country), *aff'd*, 102 F.3d 549 (5th Cir. 1996) (Table); but see *Padilla v. Pueblo of Acoma*, *supra*. The Oklahoma decisions rejecting *Hanson* and adopting the reasoning of the New Mexico Supreme Court in *Padilla v. Pueblo of Acoma* have deepened a preexisting conflict on this issue. See *Pueblo of Acoma v. Padilla*, 490 U.S. 1029 (1989) (White, J., dissenting from denial of certiorari); *DeFeo v. Ski Apache Resort*, 904 P.2d 1065, 1069 (Ct. App.) (recognizing inconsistency between *Padilla* and federal decisions), cert. denied, 903 P.2d 844 (N.M. 1995) (Table). That ripe and square conflict distinguishes the situation in this case from that in *Richardson v. Mt. Adams Furniture*, 980 F.2d 590 (1992), cert. denied, 510 U.S. 1039 (1994), in which we suggested (92-1398 U.S. Br. at 14-19) that the Court deny review of the Ninth Circuit's decision on a similar issue (tribal immunity from suit by a bankruptcy trustee against a tribal business to set aside a transfer that occurred outside Indian country).

The conflict is, moreover, one that warrants resolution by this Court. Because Oklahoma is within the Tenth Circuit, Tribes are now subject to conflicting rules on a fundamental legal question of tribal amenability to suit. When a Tribe is sued in state court, the Anti-Injunction Act (28 U.S.C. 2283), principles of federal abstention, and the lower federal courts' lack of jurisdiction to review final state judgments (see Pet. App. 11-13) will stand as significant barriers to a Tribe's ability to gain vindication of its federal rights

in federal court.⁶ Oklahoma Tribes (and other Tribes doing business in Oklahoma) are therefore largely deprived of the immunity guaranteed to them by federal law; and neither Tribes nor their potential commercial counterparties can be certain what law will apply to prospective contractual arrangements.

Finally, as the state supreme court's most recent *Aircraft Equipment* decision underscores, the state courts' holdings leave petitioner subject to attachment or garnishment of tribal tax revenues or other tribal funds. Such attachment represents a significant interference with the Tribe's essential governmental functions. In addition, as petitioner points out (Pet. 13), the practical difficulty of separating tribal funds from federal program funds provided by the United States for administration by the Tribe—which are unquestionably immune from garnishment—has already led to direct and material interference with federal programmatic interests.⁷

⁶ In *Hanson*, the court declined to consider the effect of the Anti-Injunction Act on the ground that the defendant had waived reliance on that Act by failing to raise it in the district court. 47 F.3d at 1062-1063.

⁷ With respect to the immunity of property in which the United States has an interest, see generally *Maricopa County v. Valley Nat'l Bank*, 318 U.S. 357, 362 (1943); *United States v. Alabama*, 313 U.S. 274, 282-283 (1941); *Henry v. First Nat'l Bank of Clarksdale v. Mississippi Action for Progress, Inc.*, 595 F.2d 291, 308-309 (5th Cir. 1979), cert. denied, 444 U.S. 1074 (1980). The United States Attorney's Office for the Western District of Oklahoma has already been directly and substantially involved in two separate actions, removed by the United States to federal court, seeking to gain the release of federal program funds improperly frozen by local banks in response to state court orders issued to enforce the judgments in the *Hoover* and *Aircraft Equipment* actions. *Carl E. Gungoll*

These consequences are incompatible with the special protection afforded Indian Tribes under federal law, and with "Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotation marks omitted). This Court should therefore grant review of the Oklahoma courts' "doubtful determination of [this] important question of state power over Indian affairs." *Williams v. Lee*, 358 U.S. 217, 218 (1959).⁸

Exploration Joint Venture v. Kiowa Tribe of Okla., No. CIV-96-2059-T (W.D. Okla.) (awaiting stipulation as to separation of federal and tribal funds); *Hoover v. Kiowa Tribe of Okla.*, No. CIV-96-1624-L (W.D. Okla.) (motion to remand to state court pending).

⁸ We note that the pending certiorari petition in *Citizen Potawatomi Nation v. C&L Enterprise, Inc.*, No. 96-1721 (filed Apr. 25, 1997), presents essentially the same question as this case, while the petition in *Gavle v. Little Six, Inc.*, No. 96-1215 (filed Jan. 29, 1997), presents similar questions concerning the immunity of a business corporation owned by a Tribe and organized under tribal law. The interposition of a corporate entity in No. 96-1215 somewhat complicates the immunity issue in that case; and in No. 96-1721, the issue of waiver is clouded by the existence of a potentially unclear choice-of-law clause. See 96-1721 Pet. App. at 23 ("Project" defined as building to be constructed); *id.* at 46 (contract governed by "law of the place where the Project is located"); 96-1721 Pet. at 4 n.2 (building located on "restricted Indian land" owned by the Tribe). This case thus appears to be the better vehicle for resolution of the conflict among state and federal courts on the immunity question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

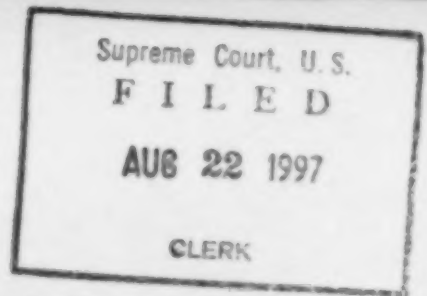
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JUNE 1997

(6)
No. 96-1037



IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE KIOWA TRIBE OF OKLAHOMA,
Petitioner,
v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,
Respondent.

On Writ of Certiorari to the Court of Appeals,
Division I, for the State of Oklahoma

JOINT APPENDIX

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Petition For Writ of Certiorari Filed December 23, 1996
Certiorari Granted June 27, 1997

82 pp

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The following items have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Court of Appeals of the State of Oklahoma, Division I, Appeal No. 86,489	A1
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DISTRICT COURT DOCKET SHEET

Civil Action Docket
Clerk of Court Oklahoma County, Oklahoma

Judge: Division D-4 Civil - Judge UN
File Date: 08/24/93
Case-ID: CJ-OK-93-006523-64

Promissory Note

Plaintiff/Attorney: Manufacturing Technologies, Inc.
Patterson, Jr., John E.

Defendant/Attorney: Kiowa Tribe of Oklahoma
Wallace, R. Brown

<u>Date</u>	<u>Progress In Case</u>
08/24/93	Petition
09/15/93	Motion to Dismiss
10/01/93	Response of Plaintiff to Defendant's Motion to Dismiss
09/21/94	Entry of Motion to Dismiss - Overruled - Tribal immunity does not extend to going away from the reservation and engaging in business ventures. Defendant granted 20 days to answer. Leamon Freeman, Judge
10/14/94	Answer of Defendant Kiowa Tribe of Oklahoma
09/06/95	Plaintiff's Motion for Summary Judgment
09/20/95	Affidavit

JA-2

09/20/95 Defendant Kiowa Tribe of Oklahoma's Brief in Opposition to Plaintiff's Motion for Summary Judgment

09/29/95 Entry of Summary Judgment Sustained, Division D-4, Civil - Lemon F.

09/29/95 Entry of Plaintiff's Motion for Summary Judgment: Sustained. This Action on a Note where the Defendant received benefit of the Note does not entitle them to say I got your money or goods and now we don't have to pay because we are immune. This is a contract action, not a damage suit. Judgment for Plaintiff for \$285,000.00 plus interest, costs and attorney fees. Leamon Freeman, Judge

10/30/95 Judgment/L. Freeman

11/09/95 Petition in Error (and Preliminary Statement) Supreme Court #86489

11/09/95 Designation of Record

11/14/95 Certificate of Appeal Filed - Supreme Court #86489

11/20/95 District Court Clerk's Certification of Record/Fast Track

11/28/95 Response to Petition in Error and Preliminary Statement

11/29/95 Amendment to Plaintiff's Motion for Attorney's Fees and Costs

11/29/95 Plaintiff's Brief in Support of Motion for Attorney's Fees and Costs

11/29/95 Plaintiff's Motion for Attorney's Fees and Costs

12/04/95 Petition in Error (and Preliminary Statement)

JA-3

12/08/95 Defendant Kiowa Tribe of Oklahoma's Objection to Motion for Attorney Fees and Costs

01/05/96 Order Awarding Attorney's Fees and Costs/L. Freeman

01/05/96 Entry of Plaintiff's Motion for Attorney Fees and Costs: Sustained per J.E./L. Freeman

02/01/96 Amendment to Petition in Error/SC #86489

02/20/96 Response to Amended Petition in Error/SC #86489

07/19/96 Answer to Petition for Certiorari/SC #86489

10/09/96 Mandate: Affirmed R:1831 F:3030

JA-4

APPELLATE COURT DOCKET SHEET

County: Oklahoma
 Case Number: CJ936523
 Trial Court: District
 Type: SD
 Trial Court Judge: Judge Leamon Freeman

Appellee(s): Manufacturing Technologies, Inc.,
 Appellant(s): Kiowa Tribe of Oklahoma

Appellant Attorney: R. Brown Wallace
 Shelia D. Tims
 500 W. Main
 Oklahoma City, OK 73102

Appellee Attorney: John E. Patterson
 210 Two Corporate Plaza
 5555 N. Grand Plaza
 Oklahoma City, OK 73112

Honorable Leamon Freeman
 Oklahoma County Courthouse
 321 Park Avenue, 2nd Floor
 Oklahoma City, OK 73102

Date	DOCA	Docket Information
10/30/95	DOOA	Judgment filed
11/09/95	TEXT	Certificate of Appeal Issued
11/09/95	PFST	Petition in Error
11/28/95	RFST	Response to Petition

JA-5

12/01/95	TEXT	Appellant's Appeal for Order Permitting Submission of Appellate Briefs
12/01/95	MRTN	Appellant's Appeal to Retain Case for Decision
12/01/95	APIE	Amended Petition in Error
12/01/95	TREC	Appellant's Record (attached to APIE; 0+14 copies)
01/08/96	TEXT	Appellant's Suggestions of Additional Authorities
02/01/96	APIE	Amended Petition in Error
02/20/96	TEXT	Response to Amended Petition in Error
02/29/96	MRDE	Journal Entry: Motion to Retain Denied. N/Attorneys
03/14/96	COA1	Cause Assigned to COA-OKC
06/28/96	OPIN	Journal Entry: Memo Opinion - Affirmed--Jones, P.J. Concur: Garrett, J.; Joplin, J.; C/Attorneys, DC Judge - Summary
06/28/96	1002	Affirmed
07/09/96	ATPC	Appellant's Petition for Certiorari (\$) COA/OKC
07/19/96	TEXT	Answer to Petition for Certiorari
09/25/96	CTDE	Journal Entry: ATPC Denied - Concur: Wilson, C.J., Hodges, Lavender, Simms, Hargrave, Opala, Watt, JJ. Dissent: Kauger, VCJ, Summers, J. - N/Attorneys.
10/03/96	MAND	Mandate issued
10/11/96	RCMD	Receipt for Mandate
01/14/97	TEXT	Letter F/USSC Petition for Certiorari filed 12/23/96; on docket as 961037

JA-6

07/08/97 TEXT Petition for Writ of Certiorari granted
in the USSC

JA-7

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)

Plaintiff,)

v.) No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

DISTRICT COURT CLERK'S
CERTIFICATION OF RECORD

Tom Petuskey, the Court Clerk of Oklahoma County,
State of Oklahoma, or his Deputy, hereby certifies that the
following documents have been reviewed and are true and
accurate copies of the originals on file in the Oklahoma
County Court Clerk's file maintained for the above-styled
cause.

A. Appellee Manufacturing Technologies Petition
on a Promissory Note filed August 24, 1993.

B. Appellant Kiowa Tribe's Motion to Dismiss,
with Brief in Support attached, filed September 15, 1993.

JA-8

C. Appellee Manufacturing Technologies' Response to Appellant Kiowa Tribe's Motion to Dismiss filed October 1, 1993.

D. Appellant Kiowa Tribe's Answer to Appellee Manufacturing Technologies Petition On A Promissory Note filed October 14, 1994.

E. Appellee Manufacturing Technologies Motion for Summary Judgment filed September 6, 1995.

F. Appellant Kiowa Tribe's Affidavit of Billy Evans Horse filed September 20, 1995.

G. Appellant Kiowa Tribe's Brief in Opposition to Appellee Manufacturing Technologies Motion for Summary Judgement filed September 20, 1995.

H. District Court's Judgment for Appellee Manufacturing Technologies filed October 30, 1995.

DATED THIS 20 DAY OF NOVEMBER, 1995.

TOM PETUSKEY, COURT CLERK

By: S/Alice Ann Palmer
(Deputy Court Clerk)

(SEAL)

JA-9

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)	
TECHNOLOGIES, INC.,)	
an Oklahoma Corporation,)	
)	
Plaintiff,)	
)	
v.)	No. CJ-93-6523-64
)	
KIOWA TRIBE OF)	
OKLAHOMA,)	
)	
Defendant.)	

PETITION ON A PROMISSORY NOTE

Plaintiff, for cause of action against the Defendant, alleges and states as follows:

1. Defendant agreed to purchase capital stock of Clinton-Sherman Aviation, Inc. from Plaintiff by Letter of Agreement dated March 19, 1990. As part of said transaction Plaintiff agreed to loan Defendant the sum of \$285,000.00 to enable Defendant to complete the said purchase.

2. On April 3, 1990, Defendant executed and delivered to Plaintiff in Oklahoma City, a Promissory Note in the principal sum of \$285,000.00, evidencing the said loan, a copy of which is attached hereto and marked Exhibit "A". Payments thereunder were to be made to Plaintiff at its address in Oklahoma City, Oklahoma.

3. Defendant has defaulted in payment of the Note and owes Plaintiff the full amount of principal and interest provided for therein.

WHEREFORE Plaintiff prays for judgment against Defendant, Kiowa Tribe of Oklahoma, in the sum of \$285,000.00 with interest thereon as specified in the Note, costs and attorney fees.

S/John E. Patterson, Jr.

JOHN E. PATTERSON, JR., OBA #6953
525 Central Park Drive, Suite 201
Oklahoma City, Oklahoma 73105
Telephone No. (405) 525-5241
Fax No. (405) 525-5256

Attorney for Plaintiff

PROMISSORY NOTE

\$285,000.00

April 8, 1990
Carnegie, Oklahoma

FOR VALUE RECEIVED, the undersigned Kiowa Tribe of Oklahoma ("Maker"), agrees to the terms of this Note and promises to pay to the order of Manufacturing Technologies, Inc. ("Lender") at 3212 East Interstate 240, Oklahoma City, Oklahoma 73135, or at such other place as may be designated in writing by the holder of this Note, the principal sum of Two Hundred Eighty-Five Thousand and no/100 Dollars (\$285,000.00), together with interest thereon at the rate of 10% per annum, payable \$47,500 30 days from the date of this Note, with the balance in full as to both principal and interest ninety days from the date of this note. Any principal or interest amount not paid when due shall bear interest until paid at a rate of 5% per annum greater than the per annum interest rate prevailing at the time the unpaid amount became due, but in no event at a rate less than 15% per annum or at an interest rate either before or after Maturity which is greater than permitted by law. Interest on this Note is calculated on the actual number of day elapsed on a basis of a 360 day year unless otherwise indicated above. For purposes of computing interest on this Note, payments of all or any portion of the Principal Amount will not be deemed to have been made until such payments are received by holder in collected funds.

ALL PARTIES PRINCIPAL. All parties liable for payment hereunder shall each be regarded as a principal and each party agrees that any party hereto with approval of

holder and without notice to other parties may from time to time renew this Note or consent to one or more extensions or deferrals of Maturity Date for any term or terms, and all parties shall be liable in some manner as on original note. All parties liable for payment hereunder waive presentment, notice of dishonor and protest and consent to partial payments, substitutions or release of collateral and to addition or release of any party or guarantor.

ADVANCES AND PAYMENT. It is agreed that the sum of all advances under this Note may exceed the Principal Amount as shown above, but the unpaid balance shall never exceed said Principal Amount. Advances and payments on Note shall be recorded on records of Lender and such records shall be prima facie evidence of such advances, payments and unpaid principal balance. Subsequent advances and the procedures described herein shall not be construed or interpreted as granting a continuing line of credit for Principal Amount. Lender reserves the right to apply any payment by Maker, or for account of Maker, toward this Note or any other obligation of Maker to Lender.

COLLATERAL. This Note and all other obligations of Maker to Lender, and all renewals or extensions thereof, are secured by all collateral securing this Note and by all other security interests heretofore or hereafter granted to Lender as more specifically described in Security Agreements and other securing documentation.

ACCELERATION. At option of holder, the unpaid balance of this Note and all other obligations of Maker to

holder, whether direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand upon the occurrence or existence of any of following events or conditions: (a) Any payment required by this Note or by any other note or obligation of Maker to holder or to others is not made when due or the occurrence or existence of any event which results in acceleration of the maturity of any obligation of Maker to holder or to others under any promissory note, agreement or undertaking; (b) Maker defaults in performance of any covenant, obligation, warranty or provision contained in any loan agreement or in any instrument or document securing or relating to this Note or any other note or obligation of Maker to holder or to others; (c) Any warranty, representation, financial information or statement made or furnished to Lender by or in behalf of Maker proves to have been false in any material respect when made or furnished; (d) The making of any levy against or seizure, garnishment or attachment of any collateral; (e) Any time Lender in good faith believes prospect of payment of this Note is impaired; (f) When in the judgment of Lender the collateral, if any, becomes unsatisfactory or insufficient either in character or value, and upon request, Maker fails to provide additional collateral as required by Lender; (g) Loss, theft, substantial damage or destruction of collateral, if any; (h) Death, dissolution, change in management or termination of existence of any Maker; or (i) Appointment of a receiver over any part of the property of any Maker, the assignment of property by any Maker for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any party liable, directly or indirectly, hereunder.

WAIVERS AND GOVERNING LAW. No waiver by holder of any payment or other right under this Note or any related agreement or documentation shall operate as a waiver of any other payment or right. Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.

COLLECTION COSTS. All parties liable for payment hereunder agree to pay reasonable costs of collection, including an attorney's fee of a minimum of 15% of all sums due upon default.

RIGHT OF OFFSET. Any indebtedness due from holder hereof to Maker or any party hereto including, but without limitation, any deposits or credit balances due from holder, is pledged to secure payment of this Note and any other obligations to holder of Maker or any party hereto, and may at any time while the whole or any part of such obligation remains unpaid, either before or after Maturity hereof, be appropriated, held or applied toward the payment of this Note or any other obligation to holder of Maker or any party hereto.

IN WITNESS WHEREOF, the Maker has executed this Note on the date first above written.

Kiowa Tribe of Oklahoma

S/J.T. Goombi
J. T. Goombi, Chairman
Carnegie, Oklahoma 73015

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)
TECHNOLOGIES, INC.,)
)
Plaintiff,)
)
v.) No. CJ-93-6523-64
)
KIOWA TRIBE OF)
OKLAHOMA,)
)
Defendant.)

MOTION TO DISMISS

COMES NOW the defendant, the Kiowa Tribe of Oklahoma, and moves this Court to dismiss the plaintiff's petition on a promissory note on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the action. 12 O.S. § 2012 B (1). Specifically, the Kiowa Tribe of Oklahoma is a federally recognized tribe. Since the Kiowa Tribe has not expressly waived its defense of sovereign immunity, the Court does not have jurisdiction over the subject matter.

2. This Court lacks jurisdiction over the person of the defendant. 12 O.S. § 2012 B (2).

3. Because the petition and summons were served outside the jurisdiction of the State of Oklahoma, the insufficiency of service of process is asserted. 12 O.S. § 2012 (B (5)). Specifically, summons was served by Don McLaughlin, Deputy Sheriff of Caddo County, Oklahoma, at the Tribal Complex in Carnegie, Oklahoma. The property occupied by the Tribal Complex is held in trust by the United States of America for the Kiowa Tribe as beneficial owners. This land is defined as "Indian Country", which Congress has defined broadly in 18 USCS § 1151 to include (1) formal and informal reservations, (2) dependent Indian communities, and (3) Indian allotments, whether restricted or held in trust by the United States.

WHEREFORE, the defendant, the Kiowa Tribe of Oklahoma, moves the Court to dismiss the plaintiff's petition on a promissory note, and for such other relief as the Court may deem just and proper.

S/Jim Merz

JIM MERZ, OBA #6953
JOHN STACY, OBA #8531
1330 N. Classen Blvd., Suite 301
Oklahoma City, Oklahoma 73106
(405) 235-2226

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September, 1993, a true and correct copy of the above and foregoing pleading was mailed, postage prepaid thereon, to:

John Patterson, Jr.
525 Central Park Drive, Suite 201
Oklahoma City, Oklahoma 73105

ATTORNEY FOR PLAINTIFF

S/Jim Merz

JIM MERZ

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)	
TECHNOLOGIES, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. CJ-93-6523-64
)	
KIOWA TRIBE OF)	
OKLAHOMA,)	
)	
Defendant.)	

BRIEF IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S PETITION
ON A PROMISSORY NOTE

COMES NOW the Defendant, the Kiowa Tribe of Oklahoma (the "Tribe" and/or "defendant") and hereby submits the following brief in support of its Motion To Dismiss Plaintiff's Petition On A Promissory Note.

Copies of petition and related documents are attached to this brief in support of motion to dismiss.

ARGUMENT AND AUTHORITY

PROPOSITION I

THE DISTRICT COURT LACKS JURISDICTION OVER THE KIOWA TRIBE AND MUST THEREFORE BE PROHIBITED FROM ADJUDICATING THE CLAIMS PRESENTED BY PLAINTIFF.

Because the District Court lacks jurisdiction over the Tribe under principles of tribal sovereign immunity, it must be prohibited from proceeding further in the action filed by plaintiff.

It is now well established that Indian tribes possess the same common law immunity from suit as that enjoyed by other sovereign powers, including the United States, as a means of protecting tribal political autonomy and tribal sovereignty. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). This long-standing protection of tribal sovereignty was recognized by the Tenth Circuit in *Pan American Company v. Sycuan Band of Mission Indians*, 884 F.2d 416 (10th Cir. 1989). In *Santa Clara, supra*, the United States Supreme Court held that Indian tribes possessed common law immunity from suit, a waiver of which "cannot be implied but must be unequivocally expressed". 56 L.Ed.2d at 115, citing *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96

S.Ct. 948 (1976), quoting *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969).

In the present case, not only was there no express waiver of tribal immunity, i.e. the Letter of Understanding, but the Guaranty Agreement expressly reserved the Tribe's right to assert this immunity. Nevertheless, the plaintiff is attempting to subject the Tribe to the jurisdiction of the District Court in the absence of an express waiver of sovereign immunity.

The Tribe is Immune from Suite Because Tribal Immunity was not Clearly Waived in the Guaranty Agreement of the Letter of Understanding. The express waiver rule, first introduced in *Santa Clara Pueblo*, *supra*, was applied by the Tenth Circuit in the case of *Ramey Construction Company v. The Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982). In *Ramey*, *supra*, the Apache Tribe contracted with Ramey Construction for the purpose of building a resort hotel complex on reservation property. After the project was completed, Ramey filed a complaint in United States District Court seeking to recover approximately \$427,000 of contract retainage withheld by the tribe and in addition alleged that certain tribal defendants had breached their contract with Ramey. The district court found it had jurisdiction over the tribal defendants.

On appeal, the Tenth Circuit reconsidered the jurisdictional issue. Below, Ramey had alleged that the tribal defendants had waived their sovereign immunity by one or all of the following actions: (1) agreeing to an

attorney's fee clause in the contract; (2) entering into a loan agreement with the Bank of New Mexico obligating the tribe to "duly pay and discharge . . . all claims of any kind . . ."; (3) submitting a certificate to the United States Economic Development Agency stating that the contract documents "constitute valid and legally binding obligations upon the parties . . ."; (4) obtaining payment and performance bonds from a surety; (5) consenting to partial summary judgment with respect to the contract retainage; and (6) including a "sue or be sued" clause in its tribal corporate charter.

In addressing each of Ramey's allegations of waiver, the Tenth Circuit first noted it is well-settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. 673 F.2d at 319, citing *Santa Clara Pueblo*, *supra*. The court then summarily dismissed the first four claims of waiver as "simply attempts by Ramey to imply a waiver when no express waiver exists". 673 F.2d at 319. The Tenth Circuit observed that there was no evidence the tribe had expressly waived its sovereign immunity in any of the documents as Ramey claimed. 673 F.2d at 319.

Similarly, the *Ramey* court refused to hold that the tribe's consent to entry of partial summary judgment on the retainage claim was a waiver of immunity with respect to Ramey's other claims, enforcing the rule that "waiver of sovereign immunity is to be strictly construed". 673 F.2d at 320. Finally, the court held that the presence of a "sue and be sued" clause in the tribal corporate charter was

insufficient to constitute a waiver of sovereign immunity.¹ See also *Seneca-Cayuga Tribe v. State Ex. Rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) ("while tribal sovereign immunity is not absolute, waivers of sovereign immunity are strictly construed") citing, *Ramey, supra*, at 320.

The result in *Ramey, supra*, should control in this case in that Ramey's second claim of waiver was the tribe's execution of a loan agreement with the Bank of New Mexico, a claim summarily rejected by the Tenth Circuit. This agreement has no more persuasive value in the present case than it did in *Ramey, supra*.

The issue of waiver in contract actions was addressed in depth in the case of *American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985), a case in which the Standing Rock Tribe had entered into a loan agreement with the plaintiff obligating the tribe to repay \$80,000 over seven years with 1% annual interest. The promissory note provided the plaintiff with remedies against Standing Rock upon default, including the right to charge interest and in addition "such other and further rights and remedies provided by law". 780 F.2d at 1376. The promissory note also provided for reimbursement of attorney's fees incurred in collection efforts and also stated that the rights and obligations under it would be "subject to the law of the District of Columbia". 780 F.2d at 1376. However, the note expressly did not

¹The effect of a "sue or be sued" clause in a tribal corporate charter is discussed further at p. 13, *infra*.

speak to Standing Rock's consent to suit or to waiver of immunity.

Standing Rock subsequently defaulted and the plaintiff brought action seeking recovery on the loan. Standing Rock responded with a motion to dismiss asserting the action was an unconsented suit barred by tribal sovereign immunity. The district court denied the motion on the basis that application of the express waiver standard would restrict a tribe's ability to enter into commercial dealing with outsiders and in some cases unjustly deprive outsiders of the benefit for which they lawfully contracted. The district court then determined that Standing Rock's sovereign immunity should be deemed waived if Standing Rock had "clearly and unequivocally indicated" its willingness to expose itself to suit on the note. In effect, the district court was holding that simply because the tribe had executed the note, it was consenting to be sued in the event of default.

On appeal, the Eighth Circuit reiterated the principle announced by the Supreme Court in *Santa Clara Pueblo, supra*, that Indian nations possess the common law immunity from suit traditionally enjoyed by sovereign powers and this immunity cannot be waived by implication but must be "unequivocally expressed". 436 U.S. at 58-59, 98 S.Ct. at 1677. On this basis, the reasoning of the district court was rejected by the appeals court even though it acknowledged that from the circumstances an implication could be made that sovereign immunity was waived. Nevertheless, the court concluded "waiver by implication" would be "directly counter to the rule of *Santa Clara Pueblo* and the body of cases on which it is based". 780 F.2d at 1374.

In so holding, the court refused to adopt the district court's reasoning that an implied waiver in contract cases would not create a wide-spread threat to tribal autonomy. The court noted that Indian tribes long have structured their commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity will stand fast. According to the court, "relaxation of the settled standard invites a challenge to virtually every activity undertaken by a tribe on the basis that the tribal immunity had been implicitly waived". 780 F.2d at 1378. The Eighth Circuit then quoted with approval the following observation from the Fifth Circuit that "to construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of congress in not relaxing the immunity, namely the protection of the interests and the property of tribes . . .". 780 F.2d at 1378, quoting, *Maryland Casualty Company v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.) cert. den., 385 U.S. 918, 87 S.Ct. 227, 171 L.Ed.2d 143 (1966).

Neither did the *Standing Rock* court give credence to the district court's concern that the express waiver standard would impair a tribe's ability to conduct business. The court dismissed this concern on the basis that tribes and persons dealing with them have long known how to waive sovereign immunity when they so wish. 780 F.2d at 1379. Finally, the court dismissed the district court's observation that the express waiver standard can unfairly deprive contracting parties of the benefit of their bargains. As argued by the plaintiff, the tribe had "welshed" on its loan with the consortium and was not attempting to hide under the blanket of tribal immunity. Nevertheless, as noted by the Eighth

Circuit, if an injustice had been worked, it was not the rigid express waiver standard which should bear the blame, but the doctrine of sovereign immunity itself. Based on *Santa Clara Pueblo*, *supra*, and its lineage, the court was compelled to conclude that "nothing short of an express and unequivocal waiver can defeat the sovereign immunity of an Indian nation". 780 F.2d at 1379.

Jurisdiction was also found lacking in the case of *Pan American Company v. Sycuan*, *supra*, a case where the parties had entered into a federally approved bingo agreement authorizing Pan Am to operate bingo games on the reservation. Subsequently Pan Am brought a breach of contract action against the tribe in federal district court. The tribe filed a motion to dismiss for lack of jurisdiction which was granted by the trial court. In assessing whether the tribe had waived its immunity to suit, the Ninth Circuit again reviewed the law as established in *Santa Clara Pueblo*, *supra*, and acknowledge the existing rule that absent congressional or tribal consent to suit, state and federal courts have no jurisdiction over Indian tribes; only consent gives the courts the jurisdictional authority to adjudicate claims raised by or against tribal defendants.

The court then addressed Pan Am's claim that the bingo agreement's arbitration clause was sufficient to constitute a waiver of tribal sovereign immunity. Specifically, Pan Am pointed to the provision in the agreement which provided that:

In the event a dispute arises between its parties . . . either party may seek arbitration

of said dispute and both parties to hereby subject themselves to the jurisdiction of the American Arbitration Association and do agree to be bound by and comply with its rules and regulations as promulgated from time to time.

884 F.2d at 416. Pan Am argued that the tribe's consent to submit to arbitration was also a submission to judicial jurisdiction as a matter of definition. The Ninth Circuit rejected this argument noting that the bingo agreement's arbitration clause did not contain the unequivocal expression of tribal consent to suit necessary to effect a waiver of the tribe's sovereign immunity. The court noted that absent an affirmative textual waiver in the terms of the contractual agreement or tribal constitution, federal courts have consistently declined to find tribal consent to federal jurisdiction. 884 F.2d at 419.

Pan Am nevertheless argued that not to imply a waiver would be to create a trap for the unsuspecting and leave Pan Am without judicially enforceable remedies for the tribe's alleged breach of contract. The court rejected this emotional argument on the basis that "Indian sovereignty, like that of other sovereigns, is not a discretionary principle subject to the vagaries of the commercial bargaining process or the equities of a given situation." 884 F.2d at 419. The court again reiterated that consent by implication, whatever its justification, still defeats the clear mandate of *Santa Clara Pueblo*, *supra*.

No matter what the circumstances, the courts of this nation have consistently adhered to the rule that an Indian tribe is immune to a suit for damages unless that immunity has been expressly and unequivocally waived. In the case of *McClendon v. U.S.*, 885 F.2d 627 (9th Cir. 1989), the fact that the tribe had entered into a lease agreement or participated in settlement of a lawsuit out of which the lease agreement arose was insufficient to waive sovereign immunity since neither the judgment nor the resulting lease contained an express waiver of sovereign immunity. In that case, the court noted that "tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish". 885 F.2d at 627, quoting *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, *supra* at 1379.

In *McClendon*, *supra*, the court justified its finding that jurisdiction was lacking partially on the basis that McClendon could have negotiated a term in the lease agreement governing consent to suit. Given that courts have consistently required express and unequivocal waiver of sovereign immunity, if McClendon failed to negotiate such a waiver, considerations of equity were not in his favor. 885 F.2d at 632.

In the present case, not only was there not an express or implied waiver of immunity by the Tribe in the Letter of Understanding, but the Guaranty Agreement itself expressly reserved the Tribe's right to assert its sovereign immunity to suit.

PROPOSITION II

SERVICE OF PROCESS IN INDIAN COUNTRY BY A DEPUTY SHERIFF OF CADDO COUNTY DOES NOT CONFER JURISDICTION ON THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA.

Even though tribal land surrounding the Kiowa Complex in Carnegie, Oklahoma, is held in trust by the United States of America, this geographic area is outside the jurisdiction of the State of Oklahoma.

For this reason, service of process in a civil action by a state officer in Indian Country is unlawful and does not confer jurisdiction on the District Court of Oklahoma County. 18 U.S.C. § 1151. *State v. Littlechief*, Okl.Cr., 573 P.2d 263, 264 through 265 [1978]. A copy of summons and the return in question is attached.

CONCLUSION

In cases where an individual or other entity attempts to initiate an action against an Indian tribe and the tribe has not expressly waived its sovereign immunity to suit, the trial court has no jurisdiction over the tribe and the action must be dismissed. In the present case, not only has the Tribe not waived its sovereign immunity, but the Guaranty Agreement contains an explicit reservation of the Tribe's right to assert its sovereign immunity. Under these circumstances, the

Tribe is immune from an action to enforce both the letter of Understanding and Guaranty Agreement regardless of any inequities which may result. As noted by several courts, individuals or companies who deal with Indian tribes and the tribes themselves are fully aware of the tribe's right to immunity and the ways in which the tribe may waive this immunity.

Respectfully submitted,

S/Jim Merz

JIM MERZ, OBA #6152
JOHN STACY, OBA #8531
1330 N. Classen Blvd., Ste 301
Oklahoma City, Ok 73106
(405) 235-2226

ATTORNEYS FOR
DEFENDANT

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CERTIFICATE OF MAILING

This is to certify that on this 15th day of September, 1993, the above and foregoing instrument was mailed, postage prepaid, to:

John Patterson, Jr.
525 Central Park Drive, Suite 201
Oklahoma City, Oklahoma 73105

ATTORNEY FOR PLAINTIFF

S/Jim Merz
Jim Merz

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)
TECHNOLOGIES, INC.,)

Plaintiff,)

v.) No. CJ-93-6523-64

KIOWA TRIBE OF)
OKLAHOMA,)

Defendant.)

RESPONSE OF PLAINTIFF TO
DEFENDANT'S MOTION TO DISMISS

Plaintiff, in response to Defendant's Motion to Dismiss denies that the claimed immunity from suit is applicable in the instant case and that service on defendant on tribal lands is improper.

PROPOSITION I

INDIAN TRIBAL IMMUNITY FROM SUIT
DOES NOT APPLY TO ACTIONS
INVOLVING ECONOMIC DEVELOPMENT
OFF RESERVATION

Defendant asserts that an Indian tribe is immune to suit, citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 98, 98 S.Ct. 1670, 56 L. Ed.2d 106. *Santa Clara Pueblo* follows a line of cases which affirm tribal immunity from lawsuit in certain limited areas. Those cases generally provide that immunity exists where tribal self government and tribal ventures conducted on tribal land are involved.

Indian Tribal sovereignty is not absolute and unchanging. Mr. Justice Frankfurter reviewed the evolution of retention of Federal power over indian lands in a case involving state regulation of off reservation fishing rights of indian tribal members in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L. Ed.2d 573. His Opinion states:

As the United States spread westward, it became evident that there was no place where the Indians could be forever isolated. In recognition of this fact the United States began to consider the Indians less as foreign nations and more as a part of our country . . .

The general notion drawn from Chief Justice Marshall's opinion in *Worcester v.*

Georgia (US) 6 Pet 515, 561, 8 L Ed 483, 501; . . . that an Indian reservation is a distinct nation within those boundaries state law cannot penetrate, has yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations. By 1880 the Court no longer viewed reservations a distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law . . .

Concurrently the influence of state law increased rather than decreased . . .

During the 1940's several States were permitted to assert criminal jurisdiction.

In 1953 Congress granted to several States full civil and criminal jurisdiction over Indian reservations . . .

The applicability of state law, we there said, (*Williams v. Lee*, 358 U.S. 217, 795 ct. 269, 3 L Ed 2d 251) depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," 358 US, at 220 . . .

But State regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*.

The Supreme Court recognized the right of a State to tax the revenues from a commercial venture conducted off reservation, considering the impact of the Indian Reorganization Act of 1934 in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L. Ed.2d 114, 93 S. Ct. 1267. The Court says:

But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake*, supra, at 75, 7 L Ed 2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 US 392, 398, 20 L Ed 2d 689, 88 S Ct 1725 (1968); *Organized Village of Kake*, supra, at 75-76, 7 L Ed 2d 573; *Tulee v. Washington*, 315 US 681, 683, 86 L Ed 1115, 62 S Ct 862 (1942); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 US 575, 72 L Ed 709, 48 S Ct 333 (1928); *Ward v. Race Horse*, 163 US 504, 41 L Ed 244, 16 S Ct

1076 (1896). That principal is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse*, supra, at 516, 41 L Ed 244, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake*, supra.

* * * *

The Indian Reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation. Unquestionably, the Act reflected a new policy of the Federal Government and aimed to put a halt to the loss of tribal lands through allotment. It gave the Secretary of Interior power to create new reservations, and tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe. As was true in the case before us, a tribe taking advantage of the Act might generate

substantial revenues for the education and the social and economic welfare of its people. So viewed, an enterprise such as the ski resort in this case serves a federal function with respect to the Government's role in Indian Affairs. But the "mere facts that property is used, among others, by the United States as an instrument for effecting its purpose does not relieve it from state taxation. "Choctaw, Oklahoma & Gulf R. Co. v. Mackey, 256 US 531, 536, 65 L Ed 1076, 41 S Ct 582 (1921) (other citations omitted).

The intent and purpose of the Reorganization Act was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by the century of oppression and paternalism." . . . The Reorganization Act did not strip Indian tribes of their reservation lands and their historic immunity from state and local control. But, in the context of the Reorganization Act, we think it unrealistic to conclude that Congress conceived of off-reservation tribal enterprises "virtually as an arm of the Government" . . . On the contrary, the aim was to disentangle the tribes from the official bureaucracy. The Court's decision in *Organized Village of Kake*, supra, which involved tribes organized under the Reorganization Act, demonstrates that off-

reservation activities are within the reach of state law. . . .

"This Court has repeatedly said that tax exemptions are not granted by implication It has applied that rule to taxing acts affecting Indians as to all others. . . . If congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." *Oklahoma Tax Comm'n v. United States*, 319 US, at 606-607, 87 L Ed 1612 Here, the rights and land were acquired by the Tribe beyond its reservation borders for the purpose of carrying on a business enterprise as anticipated by §476 and 477 of the Act. (citations omitted) These provisions are designed to encourage tribal enterprises "to enter the white world on a footing of equal competition." . . . In this context, we will not imply an expansive immunity from ordinary income taxes that businesses throughout the State are subject to. We therefore hold that the exemption in §465 does not encompass or bar the collection of New Mexico's nondiscriminatory Gross Receipts Tax and that Tribe's ski resort is subject to that tax. . . ."

Congress has authorized the Tribes to organize two separate entities, a political governing body to exercise pre-existing powers to self-government pursuant to §16 of the Act of June 18, 1934 (48 Stat. 987) and a tribal corporation to engage in business transactions pursuant to §17. 25 U.S.C. §473 provides that the provisions of §476 and §477 (Sections 16 and 17 of the Act) shall not apply to the Kiowa Tribe in the State of Oklahoma. In 1970 the Kiowa Tribe of Oklahoma enacted a constitution of by-laws which provided for economic development and authorized the tribe to contract relating thereto.

The Kiowa Tribe entered into an agreement to purchase the capital stock of Clinton Sherman Aviation, Inc., from defendants, and gave in consideration its promissory note. This transaction was a commercial venture and did not relate to tribal lands or ventures conducted on tribal lands. Plaintiff submits that the defendant is subject to "non-discriminatory state law otherwise applicable to all citizens of the state. *Mescalero Apache Tribe, supra*.

Justice Steven, especially concurring in *Oklahoma Tax Commission v. Citizen band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905 (1991) says:

. . . I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U.S.C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... (2) in

which the action is based upon a commercial activity carried on in the United States by a foreign state....")

The New Mexico Supreme Court has so held in *Pueblo of Acoma v. Padilla*, 754 P.2d 845 (N.M. 198). In that case the New Mexico Supreme Court held that the Pueblo was not immune from suit by a contractor for work done on an off-reservation location. Certiorari was denied in *Pueblo of Acoma v. Padilla*, 109 S. Ct. 1767.

It is clear that the State of Oklahoma has jurisdiction over the indian tribe and over the subject matter of the action. There is no need for an express waiver of immunity from suit when the Tribe engages in an off-reservation commercial venture.

PROPOSITION II

SERVICE OF THE SUMMONS IS VALID

Defendant attacks the sufficiency of service for the reason that the petition and summons were served at the Tribal Complex, property which is held in trust by the United States of America for the benefit of the Kiowa Tribe, citing *State v. Littlechief*, 573 P.2d 263 (Okla. 1978). That case has to do with the jurisdiction of the State of Oklahoma to prosecute a homicide which occurred on Indian Land.

The issue of service of process was not present in the case.

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LeClair v. Powers, 632 P.2d 370 (Okla. 1981) held service of process in Indian land proper, citing the following language from *Bad Horse v. Bad Horse*, 517 P.2d 893 (Mont. 1974):

"Once the district court has assumed jurisdiction over the subject matter and process has been properly served, the defendant cannot throw up a shield around herself by claiming that the State process server cannot pierce the exterior boundaries of an Indian Reservation and serve civil process therein."

If the district court has jurisdiction in this matter, it cannot be argued that service is improper.

S/John E. Patterson, Jr.

John E. Patterson, Jr. OBA 6953
5555 N. Grand Blvd., Ste 210
Oklahoma City, OK 73112
(405) 947-1985

ATTORNEY FOR PLAINTIFF

JA-41

CERTIFICATE OF SERVICE

This is to certify that on the 1st day of October, 1993, a true and correct copy of the above and foregoing instrument was mailed by first-class mail, postage prepaid, to:

Jim Merz
Merz and Stacy
1330 Classen Blvd., Ste. 301
Oklahoma City, OK 73106
Attorney for Defendant

S/John E. Patterson

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)
 TECHNOLOGIES, INC.,)
 an Oklahoma Corporation,)

Plaintiff,)

v.) No. CJ-93-6523-64

KIOWA TRIBE OF)
 OKLAHOMA,)

Defendant.)

PETITION ON A PROMISSORY NOTE

Plaintiff, for cause of action against the Defendant,
 alleges and states as follows:

1. Defendant agreed to purchase capital stock of Clinton-Sherman Aviation, Inc. from Plaintiff by Letter of Agreement dated March 19, 1990. As part of said transaction Plaintiff agreed to loan Defendant the sum of \$285,000.00 to enable Defendant to complete the said purchase.

2. On April 3, 1990, Defendant executed and delivered to Plaintiff in Oklahoma City, a Promissory Note in the principal sum of \$285,000.00, evidencing the said loan, a copy of which is attached hereto and marked Exhibit "A". Payments thereunder were to be made to Plaintiff at its address in Oklahoma City, Oklahoma.

3. Defendant has defaulted in payment of the Note and owes Plaintiff the full amount of principal and interest provided for therein.

WHEREFORE Plaintiff prays for judgment against Defendant, Kiowa Tribe of Oklahoma, in the sum of \$285,000.00 with interest thereon as specified in the Note, costs and attorney fees.

S/John E. Patterson, Jr.

JOHN E. PATTERSON, JR., OBA #6953
 525 Central Park Drive, Suite 201
 Oklahoma City, Oklahoma 73105
 Telephone No. (405) 525-5241
 Fax No. (405) 525-5256

Attorney for Plaintiff

PROMISSORY NOTE

\$285,000.00

April 8, 1990
Carnegie, Oklahoma

FOR VALUE RECEIVED, the undersigned Kiowa Tribe of Oklahoma ("Maker"), agrees to the terms of this Note and promises to pay to the order of Manufacturing Technologies, Inc. ("Lender") at 3212 East Interstate 240, Oklahoma City, Oklahoma 73135, or at such other place as may be designated in writing by the holder of this Note, the principal sum of Two Hundred Eighty-Five Thousand and no/100 Dollars (\$285,000.00), together with interest thereon at the rate of 10% per annum, payable \$47,500 30 days from the date of this Note, with the balance in full as to both principal and interest ninety days from the date of this note. Any principal or interest amount not paid when due shall bear interest until paid at a rate of 5% per annum greater than the per annum interest rate prevailing at the time the unpaid amount became due, but in no event at a rate less than 15% per annum or at an interest rate either before or after Maturity which is greater than permitted by law. Interest on this Note is calculated on the actual number of day elapsed on a basis of a 360 day year unless otherwise indicated above. For purposes of computing interest on this Note, payments of all or any portion of the Principal Amount will not be deemed to have been made until such payments are received by holder in collected funds.

ALL PARTIES PRINCIPAL. All parties liable for payment hereunder shall each be regarded as a principal and each party agrees that any party hereto with approval of

holder and without notice to other parties may from time to time renew this Note or consent to one or more extensions or deferrals of Maturity Date for any term or terms, and all parties shall be liable in some manner as on original note. All parties liable for payment hereunder waive presentment, notice of dishonor and protest and consent to partial payments, substitutions or release of collateral and to addition or release of any party or guarantor.

ADVANCES AND PAYMENT. It is agreed that the sum of all advances under this Note may exceed the Principal Amount as shown above, but the unpaid balance shall never exceed said Principal Amount. Advances and payments on Note shall be recorded on records of Lender and such records shall be prima facie evidence of such advances, payments and unpaid principal balance. Subsequent advances and the procedures described herein shall not be construed or interpreted as granting a continuing line of credit for Principal Amount. Lender reserves the right to apply any payment by Maker, or for account of Maker, toward this Note or any other obligation of Maker to Lender.

COLLATERAL. This Note and all other obligations of Maker to Lender, and all renewals or extensions thereof, are secured by all collateral securing this Note and by all other security interests heretofore or hereafter granted to Lender as more specifically described in Security Agreements and other securing documentation.

ACCELERATION. At option of holder, the unpaid balance of this Note and all other obligations of Maker to

holder, whether direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand upon the occurrence or existence of any of following events or conditions: (a) Any payment required by this Note or by any other note or obligation of Maker to holder or to others is not made when due or the occurrence or existence of any event which results in acceleration of the maturity of any obligation of Maker to holder or to others under any promissory note, agreement or undertaking; (b) Maker defaults in performance of any covenant, obligation, warranty or provision contained in any loan agreement or in any instrument or document securing or relating to this Note or any other note or obligation of Maker to holder or to others; (c) Any warranty, representation, financial information or statement made or furnished to Lender by or in behalf of Maker proves to have been false in any material respect when made or furnished; (d) The making of any levy against or seizure, garnishment or attachment of any collateral; (e) Any time Lender in good faith believes prospect of payment of this Note is impaired; (f) When in the judgment of Lender the collateral, if any, becomes unsatisfactory or insufficient either in character or value, and upon request, Maker fails to provide additional collateral as required by Lender; (g) Loss, theft, substantial damage or destruction of collateral, if any; (h) Death, dissolution, change in management or termination of existence of any Maker; or (i) Appointment of a receiver over any part of the property of any Maker, the assignment of property by any Maker for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any party liable, directly or indirectly, hereunder.

WAIVERS AND GOVERNING LAW. No waiver by holder of any payment or other right under this Note or any related agreement or documentation shall operate as a waiver of any other payment or right. Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.

COLLECTION COSTS. All parties liable for payment hereunder agree to pay reasonable costs of collection, including an attorney's fee of a minimum of 15% of all sums due upon default.

RIGHT OF OFFSET. Any indebtedness due from holder hereof to Maker or any party hereto including, but without limitation, any deposits or credit balances due from holder, is pledged to secure payment of this Note and any other obligations to holder of Maker or any party hereto, and may at any time while the whole or any part of such obligation remains unpaid, either before or after Maturity hereof, be appropriated, held or applied toward the payment of this Note or any other obligation to holder of Maker or any party hereto.

IN WITNESS WHEREOF, the Maker has executed this Note on the date first above written.

Kiowa Tribe of Oklahoma

S/I.T. Goombi

J. T. Goombi, Chairman

Carnegie, Oklahoma 73015

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IN THE DISTRICT COURT OF OKLAHOMA
COUNTY, STATE OF OKLAHOMA

MANUFACTURING
TECHNOLOGIES

Plaintiff(s)

JOHN PATTERSON

Attorney(s) for Plaintiff(s)

-vs-

Case No. CJ-93-6523-64

KIOWA TRIBE OF
OKLA.

Defendant(s)

JIM MERZ

Attorney(s) for Defendant(s)

ORDER
COURT MINUTE

Date: 9/21/94 Judge _____

Hearing On: Motion to Dismiss

Ruling By Court:

*Overruled - Tribal immunity does not extend
to going away from the reservation and engaging in business
ventures. Defendant granted 20 days to answer.*

S/Leamon Freeman

JA-49

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING)
TECHNOLOGIES, INC.,)

Plaintiff,)

v.)

No. CJ-93-6523-64

KIOWA TRIBE OF)
OKLAHOMA,)

Defendant.)

ANSWER OF DEFENDANT
KIOWA TRIBE OF OKLAHOMA

Defendant, for Answer herein alleges:

1. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the petition and hence denies the same. Upon information and belief, defendant alleges that Plaintiff dealt with an entity known as Kiowa Industrial Development Commission and not Defendant.

2. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph

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2 of the petition and hence denies the same. Upon information and belief, defendant alleges that Plaintiff dealt with an entity known as Kiowa Industrial Development Commission and not Defendant.

3. Defendant is without information sufficient to form a belief as to the truth of the allegations of paragraph 3 of the petition and hence denies the same. Upon information and belief, defendant alleges that Plaintiff dealt with an entity known as Kiowa Industrial Development Commission and not Defendant.

AFFIRMATIVE DEFENSES

Defendant is a federally recognized Indian Tribe and, as such, is immune to suit in the District Court of Oklahoma County, Oklahoma, in the absence of a waiver of such immunity.

WHEREFORE, having fully answered, Defendant prays that defendant take nothing and that it have and recover its costs herein.

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S/R. Brown Wallace
R. Brown Wallace, OBA #9310
ANDREWS DAVIS LEGG BIXLER
MILSTEN & PRICE
500 West Main
Oklahoma City, Oklahoma 73102

Telephone (405) 272-9241

ATTORNEY FOR
KIOWA TRIBE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of October, 1994, a true and correct copy of the above and foregoing document was placed in the United States Mail, postage prepaid and addressed to:

John E. Patterson, Jr.
5555 N. Grand Blvd, Ste. 210
Oklahoma City, Oklahoma 73112

S/R. Brown Wallace

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)

Plaintiff,

v.

)No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA.

Defendant.

Pursuant to Rule 13 for the District Courts of Oklahoma, the Plaintiff, Manufacturing Technologies, Inc., an Oklahoma Corporation (hereinafter referred to as "Plaintiff"), moves for Summary Judgment in its favor and against the Defendant, Kiowa Tribe of Oklahoma (hereinafter referred to as "Defendant"), on the grounds that the pleadings, exhibits on file, and the attached Affidavit of Gordon Pulliam, Officer of Manufacturing Technologies, Inc., an Oklahoma Corporation, show that there is no substantial controversy as to any material fact, and the Plaintiff is therefore entitled, as a matter of law, to Summary Judgment against said Defendant. In support of its Motion for Summary Judgment, the Plaintiff submits the following:

1. On April 3, 1990, Defendant for good and valuable consideration, made, executed and delivered to the Plaintiff, and which Plaintiff now holds, a certain promissory note in writing of that date, whereby the Defendant promised to pay said Plaintiff the principal sum of \$285,000.00, together with interest thereon and as set forth therein. A true and correct copy of said note is attached to Plaintiff's Petition, marked as Exhibit "A" and incorporated by reference herein. The Defendant has failed to pay said note in accordance with its terms thereof and is in default.

2. The amounts on said promissory note are \$285,000.00 principal, with \$140,718.75 accrued but unpaid interest, interest at the rate of 15% per annum from September 24, 1993, together with attorney fees and costs.

3. The Defendant has failed to assert any valid affirmative defense.

4. The above facts are testified to by Gordon Pulliam, as an Officer of said Plaintiff, as set forth in an Affidavit attached hereto as Exhibit "B" and incorporated by reference herein.

ARGUMENTS AND AUTHORITIES
PROPOSITION I

SUMMARY JUDGMENT SHOULD BE
GRANTED WHERE FACTS ARE NOT
CONTROVERTED.

Summary Judgment should be granted where the facts set forth in the pleadings, exhibits attached to the Petition and Affidavit which Plaintiff submits in support of its Motion for Summary Judgment, show that there is no substantial conflict as to any material fact and that the Movant is entitled to judgment as a matter of law. Rule 13 of the Rules for the District Courts of Oklahoma. *RST Service Manufacturing, Inc. v. Taylor Musselwhite, d/b/a Argus Tank & Fabrication Company*, 628 P. 2d. 366 (Okla. 1981).

PROPOSITION II

PLAINTIFF IS ENTITLED TO JUDGMENT
ON A NOTE WHEN NO DEFENSE IS
SHOWN

With respect to a signature upon a note, 12 O.S. Section 3-307 provides that:

- (1) Unless specifically denied in the pleadings, each signature on an instrument is admitted. When the effectiveness of a signature is put in issue (a) the burden of establishing it is on the

party claiming under the signature; but (b) the signature is presumed to be genuine or authorized.

- (2) When signatures are admitted or established, production of the instrument entitles the holder to recover thereon unless the Defendant establishes a defense.

The Defendants have failed to plead any affirmative defense in this case. The law of Oklahoma is clear that the Court has no choice but to rule that when the respective parties' signatures are admitted on the note, the Plaintiff is entitled to recover thereon upon production unless a real affirmative defense is established. See *Persson v. McCormisk*, 412 P.2d 619 (Okla. 1966) and *The Prudential Insurance Company of America, a corporation, vs. W.C. Bonney and Clara Lee Bonney, husband and wife, and Wilma G. Bonney*, 299 F.Supp. 790 (W.D.Okla. 1969). See also, *RST Service Manufacturing, Inc. vs. Taylor Muselwhite, d/b/a Argus Tank & Fabrication Company*, 628 P.2d 366 (Okla. 1981).

WHEREFORE, it is respectfully prayed that this Court render Summary Judgment in favor of the Plaintiff and against the Defendant, as prayed for in its Petition, and to grant such other and further relief as the law and equity may warrant.

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Respectfully submitted,

S/John E. Patterson, Jr.

John E. Patterson, Jr., OBA #6953
Two Corporate Plaza
5555 N. Grand Blvd., Suite 210
Oklahoma City, OK 73112
(405) 947-1985

Attorney for Plaintiff

HEARING ON MOTION

Hearing on this Motion shall be before Judge Leamon Freeman on September 29, 1995, at 9:00 o'clock a.m., in the Oklahoma County Courthouse.

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CERTIFICATE OF MAILING

I certify that a true and correct copy of the above and foregoing document was mailed, on the 6th day of September, 1995, U.S. Mail, postage prepaid to the following:

R. Brown Wallace
Andrews, Davis, Legg, Bixler
Milsten & Price
500 W. Main
Oklahoma City, OK 73102

S/John E. Patterson

John E. Patterson

PROMISSORY NOTE

\$285,000.00

April 8, 1990
Carnegie, Oklahoma

FOR VALUE RECEIVED, the undersigned Kiowa Tribe of Oklahoma ("Maker"), agrees to the terms of this Note and promises to pay to the order of Manufacturing Technologies, Inc. ("Lender") at 3212 East Interstate 240, Oklahoma City, Oklahoma 73135, or at such other place as may be designated in writing by the holder of this Note, the principal sum of Two Hundred Eighty-Five Thousand and no/100 Dollars (\$285,000.00), together with interest thereon at the rate of 10% per annum, payable \$47,500 30 days from the date of this Note, with the balance in full as to both principal and interest ninety days from the date of this note. Any principal or interest amount not paid when due shall bear interest until paid at a rate of 5% per annum greater than the per annum interest rate prevailing at the time the unpaid amount became due, but in no event at a rate less than 15% per annum or at an interest rate either before or after Maturity which is greater than permitted by law. Interest on this Note is calculated on the actual number of day elapsed on a basis of a 360 day year unless otherwise indicated above. For purposes of computing interest on this Note, payments of all or any portion of the Principal Amount will not be deemed to have been made until such payments are received by holder in collected funds.

ALL PARTIES PRINCIPAL. All parties liable for payment hereunder shall each be regarded as a principal and each party agrees that any party hereto with approval of

holder and without notice to other parties may from time to time renew this Note or consent to one or more extensions or deferrals of Maturity Date for any term or terms, and all parties shall be liable in some manner as on original note. All parties liable for payment hereunder waive presentment, notice of dishonor and protest and consent to partial payments, substitutions or release of collateral and to addition or release of any party or guarantor.

ADVANCES AND PAYMENT. It is agreed that the sum of all advances under this Note may exceed the Principal Amount as shown above, but the unpaid balance shall never exceed said Principal Amount. Advances and payments on Note shall be recorded on records of Lender and such records shall be prima facie evidence of such advances, payments and unpaid principal balance. Subsequent advances and the procedures described herein shall not be construed or interpreted as granting a continuing line of credit for Principal Amount. Lender reserves the right to apply any payment by Maker, or for account of Maker, toward this Note or any other obligation of Maker to Lender.

COLLATERAL. This Note and all other obligations of Maker to Lender, and all renewals or extensions thereof, are secured by all collateral securing this Note and by all other security interests heretofore or hereafter granted to Lender as more specifically described in Security Agreements and other securing documentation.

ACCELERATION. At option of holder, the unpaid balance of this Note and all other obligations of Maker to

holder, whether direct or indirect, absolute or contingent, now existing or hereafter arising, shall become immediately due and payable without notice or demand upon the occurrence or existence of any of following events or conditions: (a) Any payment required by this Note or by any other note or obligation of Maker to holder or to others is not made when due or the occurrence or existence of any event which results in acceleration of the maturity of any obligation of Maker to holder or to others under any promissory note, agreement or undertaking; (b) Maker defaults in performance of any covenant, obligation, warranty or provision contained in any loan agreement or in any instrument or document securing or relating to this Note or any other note or obligation of Maker to holder or to others; (c) Any warranty, representation, financial information or statement made or furnished to Lender by or in behalf of Maker proves to have been false in any material respect when made or furnished; (d) The making of any levy against or seizure, garnishment or attachment of any collateral; (e) Any time Lender in good faith believes prospect of payment of this Note is impaired; (f) When in the judgment of Lender the collateral, if any, becomes unsatisfactory or insufficient either in character or value, and upon request, Maker fails to provide additional collateral as required by Lender; (g) Loss, theft, substantial damage or destruction of collateral, if any; (h) Death, dissolution, change in management or termination of existence of any Maker; or (i) Appointment of a receiver over any part of the property of any Maker, the assignment of property by any Maker for the benefit of creditors, or the commencement of any proceedings under any bankruptcy or insolvency laws by or against any party liable, directly or indirectly, hereunder.

WAIVERS AND GOVERNING LAW. No waiver by holder of any payment or other right under this Note or any related agreement or documentation shall operate as a waiver of any other payment or right. Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.

COLLECTION COSTS. All parties liable for payment hereunder agree to pay reasonable costs of collection, including an attorney's fee of a minimum of 15% of all sums due upon default.

RIGHT OF OFFSET. Any indebtedness due from holder hereof to Maker or any party hereto including, but without limitation, any deposits or credit balances due from holder, is pledged to secure payment of this Note and any other obligations to holder of Maker or any party hereto, and may at any time while the whole or any part of such obligation remains unpaid, either before or after Maturity hereof, be appropriated, held or applied toward the payment of this Note or any other obligation to holder of Maker or any party hereto.

IN WITNESS WHEREOF, the Maker has executed this Note on the date first above written.

Kiowa Tribe of Oklahoma

S/I.T. Goombi

J. T. Goombi, Chairman
Carnegie, Oklahoma 73015

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
 INC., an Oklahoma corporation,)

Plaintiff,)

v.)

)No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

AFFIDAVIT

STATE OF OKLAHOMA)

SS:

COUNTY OF OKLAHOMA)

The undersigned Affiant, of lawful age, being sworn upon oath, deposes and states:

1. That I am President of Manufacturing Technologies, Inc., an Oklahoma Corporation, (hereinafter referred as "Plaintiff"), the Plaintiff in the above captioned case. I have personally reviewed and examined the account file of Kiowa Tribe of Oklahoma (hereinafter referred to as "Defendant"). As President, I am qualified and authorized

to execute this Affidavit on behalf of Plaintiff on the basis of my personal knowledge.

2. Upon review of the aforementioned file, I do state for the record that Plaintiff is currently in possession of a certain promissory note dated April 3, 1990, executed by J.T. Goombi, Chairman of Kiowa Tribe of Oklahoma. I further state that a true and correct copy of the note is attached to Plaintiff's Petition and marked as Exhibit "A".

3. I further state that the note is in default by reason of failure of payment of all sums due and owing in accordance with its terms.

4. I further state that pursuant to the terms of the note sued upon, Plaintiff considers and has declared the Defendant to be responsible for and liable to the Plaintiff on the aforementioned note in the sum of \$285,000.00, with interest as specified in the note until paid, for all collection expenses, accrued and accruing, and for a reasonable attorney fee.

5. The undersigned has personal knowledge of the preceding facts which are admissible in evidence and can testify to the truth of said facts.

Further Affiant Saith Not.

 Gordon Pulliam

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STATE OF OKLAHOMA)
) ss
COUNTY OF OKLAHOMA)

Signed and sworn to before me on this ____ day of
_____, 1995, by Gordon Pulliam.

Notary Public

My Commission Expires:

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma corporation,)

Plaintiff,)

v.)

No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

AFFIDAVIT

STATE OF OKLAHOMA)
) ss:
COUNTY OF CADDO)

Billy Evans Horse, of lawful age, being first duly
sworn states:

1. I am currently chairman of the Kiowa
Business Committee, a body of the Kiowa Tribe of
Oklahoma.

2. The Kiowa Tribe of Oklahoma is a federally
recognized Indian tribe.

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3. The Kiowa Tribe of Oklahoma has not waived its sovereign immunity with respect to any matter in this action, nor has it consented to any suit against it for the matters involved in this action.

DATED this 19th day of September, 1995.

FURTHER AFFIANT SAYETH NOT.

S/Billy Evans Horse
BILLY EVANS HORSE

STATE OF OKLAHOMA)
) SS:
COUNTY OF CADDQ)

Signed and sworn to before me on this 19th day of September, 1995, by Billy Evans Horse.

S/Kathy J. Franklin
Notary Public

My Commission Expires:

S/September 15, 1997
(SEAL)

JA-67

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)
)
Plaintiff,)

v.) No. CJ-93-6523
)

KIOWA TRIBE OF OKLAHOMA,)
)
Defendant.)

DEFENDANT KIOWA TRIBE OF OKLAHOMA'S
BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

FACTS

The Kiowa Tribe of Oklahoma (Kiowa) is a federally recognized Indian Tribe. 47 Fed. Reg. 53130, 53132 and 53133.

J.T. Goombi, chairman of its business committee, executed the promissory note sued upon as consideration for the purchase of shares in an Oklahoma corporation. That note contains, among other items, the provision:

"Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma"

There is no evidence that Kiowa has waived its sovereign immunity or consented in any way to be sued in this action.

The promissory note is in default as a result of payments not being made.

Kiowa has defended on the basis that, as a federally recognized Indian tribe, it is immune¹ from damage suits, but may, in proper factual circumstances, be subject to certain decrees of an equitable or declaratory nature.

¹ Kiowa is cognizant of this court's September 21, 1994, order overruling its motion to dismiss. The motion was based upon sovereign immunity to damage suits. The court ruled: "Overruled. - Tribal immunity does not extend to going away from the reservation and engaging in business ventures. Defendant granted 20 days to answer. Leamon Freeman" Kiowa, by this brief, seeks to clarify that the claim of immunity is as to damage suits, as opposed to suits of an equitable or declaratory nature. Kiowa re-urges its motion to dismiss in light of the concepts propounded herein.

ARGUMENTS AND AUTHORITIES

A. A FEDERALLY RECOGNIZED INDIAN TRIBE IS IMMUNE FROM DAMAGE SUITS; IT MAY BE SUBJECT TO EQUITABLE OR DECLARATORY SUITS, THOUGH

Kiowa submits that, as a matter of federal law, it is a sovereign entity and immune from damage suits absent a clear waiver or congressional abrogation of that immunity. That law is basic and well established. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L Ed 2d 106 (1978). It is important to note that Kiowa urges here that this immunity is to damage suits,

Confusion as to the nature and extent to this immunity arises from federal case law which permits the entry of various equitable or declaratory decrees, so long as those decrees do not result in an infringement upon tribal self-government or sovereignty. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242, 14 L Ed 2d 165 (1965). Generally, these cases involve attempts by a state either to tax or regulate certain tribal activities. The cases represent a means of deciding disputes among the triad of state/federal/tribal sovereigns.

There is no overriding federal authority which holds a tribe subject to a damage suit in state court, absent a waiver of the tribe's immunity. In fact, federal law is to the contrary.

For an example of a case involving the entry of a declaratory judgment against a tribe, coupled with the refusal of a damage judgment, see *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S. Ct. 905, 112 L Ed 2d 1112 (1991). There the United States Supreme Court ruled that Oklahoma could impose a cigarette tax upon certain cigarette sales in Indian Country² and that the tribe should aid Oklahoma in collection. But, the Court refused a damage judgment against the tribe as a remedial device for its not collecting the taxes. In response to the argument from Oklahoma that immunity cannot insulate a tribe from its business ventures, *Citizen Band*, at 910, the Supreme Court explained:

"A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in an number of cases. (citations omitted) . . . Congress has consistently reiterate its approval of the immunity doctrine (citations omitted) . . . Under these circumstances, we are not disposed to modify the long-established principal of tribal

² "Indian Country" is defined 18 USC § 1151. That definition is broader than "reservation" as used in the court's order of September 21, 1994. As technical point, there are no "reservations" in Oklahoma — only "Indian Country".

sovereign immunity."
(emphasis added) *Citizens Band*, at 910.

In a concurring opinion, Justice Stevens, who was not persuaded by the desirability of an immunity concept, nonetheless conceded:

"The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law. (citation omitted, emphasis added) *Citizens Band*, at 912.

Citizen Band clearly outlines the federal position, in a single case, that the United States Supreme Court will enter certain decrees respecting an Indian tribe, but will, in the same case, honor the tribes immunity from damage suits.

Thus, an Indian tribe, while perhaps subject to some equitable or declaratory suits, is not subject to a damage suit. This result is reached in a legion of cases. Those cases cannot be confused with cases where there is an equitable or declaratory decree concerning such things as state taxation or regulation of tribal activities.

B. EXTRATERRITORIAL ACTIVITY DOES NOT WAIVE IMMUNITY TO DAMAGE SUITS

Plaintiff has argued, with success, that an Indian tribe, acting off Indian Country, has no sovereign immunity. Plaintiff relies upon *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L. Ed. 2d 114 (1973) which includes the statement:

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state laws otherwise applicable to all citizens of the State."

Mescalero is not authority for the concept that a tribe has no immunity to a damage suit. *Citizens Band*, decided seventeen years after *Mescalero*, clearly recognizes immunity to damage suits. Rather, *Mescalero* involved a declaration that a tribe had no broad immunity from state sales taxes arising from its operation of an off-reservation ski resort in New Mexico. In fact, the qualifying phrase from *Mescalero*, cited above, is "Absent express federal law to the contrary . . ." There is indeed federal law to the contrary on damage suits. That law is that tribes are immune. *Citizens Band*, supra.

The mere fact that a tribe engages in extraterritorial operation does not waive its federally protected immunity

from damage suit. *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F2d 1166 (10th Cir. 1992) (recognizing tribal immunity and dismissing bank's interpleader as to the tribe and private parties); *Sac and Fox Nation v. Hanson*, 47 F 3rd 1061 (10th Cir. 1995) (recognizing tribal immunity to a damage suit, even though the action arose off Indian Country).

Any waiver of that immunity cannot be implied (as, for example, from going off Indian Country) but must arise from two sources (1) a clear waiver by the tribe, or (2) a Congressional abrogation, *Santa Clara*, supra. there is no Congressional abrogation in this case and, rather than a waiver, here the tribe, in the very note sued upon, expressly reserved its sovereign rights. Those reserved rights include immunity.

Thus, while a tribe's activity off of Indian Country may have various implications with respect to state taxation or state regulation, those activities do not constitute a waiver of its immunity from damage suits. This is particularly so when the tribe expressly reserves its sovereign rights.

Because tribal immunity is "an established part of our law" *Citizen Band*, supra, and because, in negotiating and documenting a commercial transaction, the parties have ample opportunity to provide for a waiver of immunity if one is desired, a court should not stretch existing law to supply such a waiver. Certainly, such a waiver should not be implied in the face of an express reservation of the tribe's sovereign rights.

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CONCLUSION

Summary judgment is improper, and, in fact, this case should be dismissed. This is so because a federally recognized Indian tribe retains, still, its federally protected immunity from damage suits. While the tribe's extra-territorial activities may expose it to various aspects of state taxation or regulation, and perhaps to equitable decrees, its basic immunity to damage suits remains intact.

S/R. Brown Wallace
R. Brown Wallace
ANDREWS DAVIS LEGG
BIXLER MILSTEN & PRICE
500 West Main
Oklahoma City, OK 73102
Telephone: (405) 272-9241

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of September, 1995, a true and correct copy of the above and foregoing document was placed in the United States Mail, postage prepaid and addressed to:

John E. Patterson, Jr.
Two Corporate Plaza
5555 N. Grand Blvd., Suite 210
Oklahoma City, Oklahoma 73112

S/R. Brown Wallace

JA-75

IN THE DISTRICT COURT OF OKLAHOMA
COUNTY, STATE OF OKLAHOMA

MANUFACTURING
TECHNOLOGIES
Plaintiff(s)

-vs-

KIOWA TRIBE OF
OKLAHOMA
Attorney(s) for Defendant(s)

John Patterson 947-1985
5555 N/ Grand Blvd., Suite 210
OKC 73112
Attorney(s) for Plaintiff(s)

Case No. CJ-93-6523

R. Brown Wallace 272-9241
500 W. Main
OKC 73102
Defendant(s)

COURT MINUTE

Date: September 29, 1995 Judge _____

Hearing On: Plaintiff's Motion For Summary Judg.
Ruling By Court:

Sustained

This action on a note where the defendant received benefit of the note does not entitle them to say I got you(sic) money or goods and now we don't have to pay because

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*we are immune. This is a contract action, not
a damage suit.*

*Judgment for plaintiff for \$285,000.00
plus interest, costs and attorney fees.*

*S/Leamon Freeman
Judge*

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

MANUFACTURING TECHNOLOGIES,)
INC., an Oklahoma Corporation,)

Plaintiff,)

v.)

)No. CJ-93-6523

KIOWA TRIBE OF OKLAHOMA,)

Defendant.)

JUDGMENT

On this 13 day of October, 1995, there came on for hearing plaintiff's motion for summary judgment. Upon examination of the pleadings, plaintiff's motion, with affidavits attached and defendant's response, with affidavits attached, the court finds that there is no substantial controversy as to any material fact and that plaintiff is entitled to judgment as a matter of law;

The Court further finds that defendant, Kiowa Tribe of Oklahoma, for good and valuable consideration, made, executed and delivered to Plaintiff, Manufacturing Technologies, Inc., a promissory note dated April 3, 1990, in the principal sum of Two Hundred Eighty Five Thousand

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Dollars (\$285,000.00). The note provided for interest at the rate of Ten Percent (10%) per annum on principal payments made prior to default, and Fifteen Percent (15%) per annum after default.

Default of payments of the principal sum of Forty Seven Thousand Five Hundred Dollars (\$47,500.00) was made on May 3, 1990, and default was made on the balance of the principal sum due on July 2, 1990,

Plaintiff has made demand of Defendant for satisfaction of the sums due and Defendant has failed to pay the sums or any part thereof.

Based upon the aforementioned facts to which no genuine issue exists, the Court finds that Plaintiff, Manufacturing Technologies, Inc., is entitled to judgment as a matter of law against Defendant, Kiowa Tribe of Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that plaintiff, Manufacturing Technologies, Inc., have and recover judgment of and from Defendant, Kiowa Tribe of Oklahoma, for the sum of Two Hundred Eight Five Thousand Dollars (\$285,000.00) accrued interest in the sum of One Hundred Sixty Thousand Four Hundred Seventy Dollars and 83/100's (\$160,470.83) together with costs of this action, and for reasonable attorney fees, as provided in said note, with said note being merged into this judgment.

Dated this 30 day of October, 1995.

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S/Leamon Freeman
LEAMON FREEMON,
Judge of the District Court

Approved:

S/John E. Patterson, Jr.
John E. Patterson, Jr., OBA #6953
Two Corporate Plaza
5555 N. Grand Blvd., Suite 210
Oklahoma City, OK 73112
(405) 947-1985
Attorney for Plaintiff

S/R. Brown Wallace
R. Brown Wallace, OBA #9310
Andrews Davis Legg Bixler
Milsten & Price
500 W. Main
Oklahoma City, OK 73102
(405) 272-9241
Attorney for Defendant

7
NO. 96-1037

Supreme Court, U. S.

FILED

AUG 25 1997

CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996**

THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe

Petitioner

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation

Respondent

**On Writ of Certiorari
to the Court of Appeals, Division I
For the State of Oklahoma**

BRIEF FOR PETITIONER

R. BROWN WALLACE

Counsel of Record

SHELIA D. TIMS

ANDREWS DAVIS LEGG BIXLER

MILSTEN & PRICE

500 West Main

Oklahoma City, Oklahoma 73102

(405) 272-9241

August 25, 1997

Attorneys for Petitioner

49 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Indian Commerce Clause, a federally recognized Indian tribe that has not waived its sovereign immunity, is subject to the "inherent jurisdiction" of a state court because the commerce from which the suit arises took place, in part, outside tribal territory?
2. Whether, under the Indian Commerce Clause and the Treaty Clause, state jurisdiction over Indian tribes can be limited solely by an explicit "ouster" of that jurisdiction by Congress?

LIST OF PARTIES

Petitioner:

The Kiowa Tribe of Oklahoma, a federally
recognized Indian Tribe

Respondent:

Manufacturing Technologies, Inc., an Oklahoma
corporation

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NO. 96-1037

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996**

**THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe**

Petitioner

v.

**MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation**

Respondent

**On Writ of Certiorari
to the Court of Appeals, Division I
For the State of Oklahoma**

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Oklahoma Court of Civil Appeals, Division I was not published or otherwise reported. The text of the opinion is reproduced in the Petition for a Writ of Certiorari, Appendix p. 1 through 4.

JURISDICTION

The opinion of the Oklahoma Court of Civil Appeals, Division 1, was entered June 28, 1996. Certiorari was denied by the Oklahoma Supreme Court in September 25, 1996. The Petition for a Writ of Certiorari was filed December 23, 1996. Certiorari was granted June 27, 1997. Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes. . . .

Article II, Section 2, of the United States Constitution:

[The President] shall have Power, by and with the advice and consent of the Senate to Make Treaties

Article VI, Clause 2 of the United States Constitution:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land;

and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

The Kiowa Tribe of Oklahoma ("Kiowa" or the "Tribe") is a federally recognized Indian tribe. 61 Fed.Reg. 58,211, 58,213 (1996). Federal recognition means that Kiowa has "the immunities and privileges available to . . . federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States. . . ." 25 C.F.R. § 83.2. As a part of this relationship, Congress has a trust responsibility to protect each tribe's sovereignty. 25 U.S.C. § 3601(2).

Kiowa's government is based in Carnegie, a small town in southwestern Oklahoma. There are 11,007 members enrolled in the Kiowa tribe. (Official Tribal Roll).

Kiowa's original homeland was in what is now South Dakota, in the vicinity of the Black Hills. The Tribe was nomadic. It ranged from the Yellowstone in the north to Belize in the south. Marriott, Alice, *The Ten Grandmothers*, University of Oklahoma Press (Norman, Okla. 1945) By the early 19th century, the Tribe controlled much of what is now western Oklahoma. McCoy, Ronald, *Kiowa Memories*, Morning Star Gallery (Santa Fe, N.M. 1987) The Kiowas were "horse Indians" who were able to "hold out and protect their lands in a striking manner." Mayhall, Mildred P., *The*

Kiowas, University of Oklahoma Press (Norman, Okla. 1962).

Eventually, Kiowa made treaties with the United States. Treaties were made in 1837 (7 Stat. 533), 1853 (10 Stat. 1013), 1865 (14 Stat. 717) and 1867 (15 Stat. 581, 589). The 1867 treaty is known as the Medicine Lodge Treaty. It set aside a reservation in what is now southwestern Oklahoma. In less than 30 years, Kiowa's reservation lands were taken. The former reservation was divided into 160 acre plots and given to individual members under the terms of the Jerome Agreement of October 6, 1892. Any land which was left unallotted was opened to settlement and the Tribe received cash compensation for it.

Kiowa was left without a reservation. It held no significant block of contiguous land. All that remained were small, scattered parcels that total about 1,200 acres. (Records, Kiowa Business Committee) Today, Kiowa lands consist of those parcels, along with some interest in about 3,000 acres held in trust for it and two other tribes.

Kiowa is not the only tribe in Oklahoma that does not have a reservation. For many years, Congress allotted reservation land to tribal members and opened excess land to settlement. (See, Cohen, Felix S., *Handbook of Federal Indian Law*, (1982 ed.) at pp. 127-139.) This allotment policy left all Oklahoma tribes with greatly diminished lands. Each tribe must now operate its government from a smaller and scattered land base. *Id.* at pp. 770-796.

Kiowa operates its government under a Constitution and Bylaws that were adopted in 1970. Thus, Kiowa's present day government is only 27 years old. Legislative authority is given to the tribal membership as a whole, but it is largely delegated to an eight member Business Committee. Day-to-day operations are performed by this Business Committee under executive powers. (Kiowa Constitution, Art. III and V) The Kiowa Constitution places some judicial authority in a Hearing Board and an Election Board. Largely, though, Kiowa relies upon the Anadarko Area Court of Indian Offenses for its judicial system.

Kiowa's government employs 108 people. For the most part, these tribal employees administer federal/tribal programs. (Reports, Kiowa Business Committee) Kiowa's annual budget for 1996-1997 was \$970,533.00.¹ (Records, Kiowa Business Committee)

This particular case is one in a series of five related suits against Kiowa. Each of these suits is based on promissory notes that Kiowa gave to purchase all of the stock in Clinton-Sherman Aviation, Inc., an Oklahoma corporation.² Neither Congress nor the Tribe consented to

¹Federal program funding is largely excluded from this figure.

²The four other suits are *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995) cert. denied ___ U.S. ___, 116 S.Ct. 1675, 134 L.Ed.2d 799 (1996); *Aircraft Equipment Co. v. The Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996) ("Aircraft Equipment I"); *JBJ Investments, Inc. v. The Kiowa Tribe of Oklahoma*, No. 87,032, Oklahoma Supreme Court (appeal pending); *Carl E. Gungoll Exploration Joint Venture v. The Kiowa Tribe of Oklahoma*, No. 87,031, Oklahoma (continued...)

this suit or otherwise waived Kiowa's sovereign immunity. Rather, the Tribe specifically reserved its sovereign rights in the very note upon which it was sued. (JA 14)³

Clinton-Sherman Aviation, Inc. was an aircraft repair and maintenance business at the former Clinton-Sherman Air Force Base, near Burns Flat in western Oklahoma. *Hoover*, 909 P.2d at 60, n. 2. That former Air Force base is outside of "Indian Country."⁴

In exchange for the part of the stock of Clinton-Sherman Aviation, Inc., Kiowa gave Manufacturing Technologies, Inc. ("Manufacturing Technologies") a promissory note for \$285,000.00. (JA 9) The note was made by the Kiowa Tribe, itself. It was dated April 3, 1990, and was payable in two installments, due within 90 days from its date. (JA 11) The Tribe gave similar notes to purchase the rest of the shares of stock. *See Hoover*, 909 P.2d at 60; *Aircraft Equipment I*, 921 P.2d at 360. Each of the notes was secured by a pledge of the Clinton-Sherman Aviation, Inc. stock. *Hoover*, 909 P.2d at 60, note 3.

As part of the transaction, Kiowa refused to give its consent to suit or to waive its tribal sovereign immunity.

²(...continued)

Supreme Court (appeal pending). There are other related legal actions not described here.

³"JA" shall refer to the Joint Appendix filed in this proceeding.

⁴"Indian Country" is defined at 18 U.S.C. § 1151.

The parties inserted into each of the notes the following provision:

Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.

(JA 14)

Manufacturing Technologies' district court petition alleges that the note was executed and delivered in Oklahoma City, outside Indian Country. (JA 10) There is some suggestion that the Tribal Chairman's signature may have been affixed to the note at the Tribal Chairman's office, which is within Indian Country.⁵ But, there was no basis to dispute that the actual delivery of the note and the exchange of the note for the stock took place in Oklahoma City, outside Indian Country. Payments were to be made in Oklahoma City. (JA 10) The purchased business was also located outside Indian Country.⁶

During the 90 day note period, Kiowa did not make scheduled payments on any of the notes. Holders of the notes, except for Manufacturing Technologies, foreclosed upon the shares that they held as collateral. The shares were sold at public auction for \$1.00. *Hoover*, 909 P.2d at 60. The note holders sued Kiowa for the deficiency that was left after the \$1.00 was credited against the debt. Kiowa has

⁵The note reflects "Carnegie, Oklahoma." (JA 11.)

⁶The location of the business is, however, within the boundaries of the Kiowa reservation set aside under the terms of the Medicine Lodge Treaty.

done nothing to stop or otherwise object to the foreclosure of the shares. The foreclosure has been completed.

Manufacturing Technologies did not bother to foreclose upon its collateral. Instead, it sued Kiowa upon the note in the District Court of Oklahoma County, Oklahoma. Kiowa moved to dismiss and asserted its tribal sovereign immunity as a defense. (JA 15) The motion was overruled upon the basis that tribal immunity did not apply "to going away from the reservation and engaging in business ventures." (JA-48)

In its Answer, Kiowa again raised its immunity as a defense. (JA 50) Kiowa also defended against Manufacturing Technologies' motion for summary judgment (JA 52) upon the basis of sovereign immunity. (JA 67) The trial court continued to disregard the immunity defense. It entered judgment against Kiowa for \$285,000.00, plus interest and costs. (JA 77)

Kiowa appealed the judgment. Again it asserted the defense of sovereign immunity. The Oklahoma Court of Civil Appeals, Division 1,⁷ concluded it was bound by the Oklahoma Supreme Court's decision in *Hoover*, which was handed down during the time this appeal was pending. The

⁷The Oklahoma Court of Civil Appeals is Oklahoma's intermediate appellate court. Under Oklahoma procedure, appeals are filed with the Oklahoma Supreme Court. The Oklahoma Supreme Court has the discretion to assign cases to the intermediate appellate court for decision. The intermediate appellate court decisions are subject to review on petition for certiorari to the Oklahoma Supreme Court. The Oklahoma Supreme Court denied Kiowa's petition for certiorari to review this case.

Court of Civil Appeals observed, "[t]his Court will not presume to second guess the reasoning of our Supreme Court." It then held, "[t]he promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding." (Cert. Pet. A 4)⁸

This particular case has not yet resulted in efforts to collect the judgment from Kiowa. But in the related cases, there have been repeated, extensive and disruptive collection efforts. Kiowa's tribal oil and gas severance taxes were seized through state court creditor's bill and garnishments. Tribal tax revenues that are needed to run Kiowa's government are being paid to and held by the Oklahoma County Court Clerk.

These collection efforts also interfered with Kiowa's right to enforce its own law in its own land. Kiowa's tax statutes create a lien on lands within Kiowa's Indian Country if the oil and gas severance taxes are not paid. Kiowa had the right to foreclose this lien because the oil and gas producers paid the tax to the Oklahoma County Court Clerk instead of to Kiowa. Kiowa was ordered not to enforce its law.

The judgment creditors in the related cases did not limit collection efforts to tribal funds. Federal monies were seized. Funds that Congress authorized to be expended on education, Head Start, job training and housing have been frozen by state court garnishment actions. These federal

⁸"Cert. Pet. A" refers to the appendix of the petition for certiorari filed in this proceeding.

monies were appropriated under the Indian Self Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, and the Indian Tribal Judgment Funds Use and Distribution Act, 25 U.S.C. 1401 *et seq.* Congress' decision to enact these programs has essentially been overridden by the state court's decision to enforce its own judgment.⁹

If allowed to stand, the judgment in this case will be collected in the same manner. The Oklahoma Supreme Court held that if it has the power to render a judgment, then it has the power to enforce it. *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 939 P.2d 1143 (Okla. 1997) ("*Aircraft Equipment II*"), *cert. pending*, *Kiowa Tribe of Oklahoma v. Aircraft Equipment Co.*, U.S. Supreme Court, No. 97-216. Hence, the damage award in this case can be used to seize the Tribe's property, stop its laws and shut down its government.

SUMMARY OF ARGUMENT

Congress has plenary authority over Indian Commerce and Indian affairs because this power was granted to it under the Indian Commerce Clause and the Treaty Clause. U.S. Const. Art. I, § 8, cl. 3; Art. II, § 2. Congress exercised

⁹See pgs. 5-6, fn.2 and pg. 21, fn. 15 for citations to the related cases in which tribal taxes were seized and federal monies were frozen. The federally appropriated funds were recovered by the Tribe after about one year of legal challenges. The tax revenues and other tribal funds are still being held pending the outcome of other suits.

this power and decided that tribes should be self-sufficient and economically stable. This goal of tribal self-determination is to create strong tribal governments that can operate quality services for their communities and economies. 25 U.S.C. § 450(b).

Congress also has a trust responsibility to protect the sovereignty of tribal governments. Tribal sovereignty includes the doctrine of tribal immunity. Congress has not abandoned this doctrine, but instead, has reaffirmed it and even specifically preserved it in one act. 25 U.S.C. § 450n(1); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). Immunity is vital to protect a new and developing tribal government from the costs and demands of litigation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

The regulation of tribal sovereignty is the sole province of the federal government. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed. 2d 10 (1980). Tribal immunity is privileged from diminution by the states. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S.Ct. 2305, 2313, 90 L.Ed. 881 (1986).

The Supremacy Clause requires that Oklahoma respect supreme federal law on tribal immunity. Oklahoma must regard tribal immunity as the "law of the land for the states." *Howlett by and through Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Oklahoma

may not use "comity" to refuse to acknowledge supreme federal law. *Idaho v. Couer d'Alene Tribe of Idaho*, __ U.S. __, 117 S. Ct. 2028, 65 U.S. L.W. 4540, 4544 (1997).

Because tribal immunity is the supreme law of the land, Oklahoma must recognize that it has no jurisdiction in this case and dismiss it.

Finally, Oklahoma is divested of its power over Indian commerce because the Constitution allocates to Congress the authority to regulate this area. Thus, Congress is not required to pass legislation which ousts Oklahoma from jurisdiction over suits that arise from Indian Commerce.

ARGUMENT

I.

AN INDIAN TRIBE IS NOT SUBJECT TO SUIT IN A STATE COURT, EVEN IF SOME OF THE DISPUTED COMMERCIAL ACTIVITY TOOK PLACE OUTSIDE INDIAN LAND.

Introduction

This case poses the question of whether tribal sovereign immunity protects Indian tribes from state court damage suits that arise from the tribe's commerce outside Indian Country. For conceptual clarity, we note that when this brief refers to "tribal sovereign immunity" it means a

tribe's immunity from suit in state courts. In this brief, "tribal sovereign immunity" does not suggest a tribe's immunity from state taxation or regulatory laws, if a tribe operates outside of its Indian Country. *Mescalero Apache Tribe v. Jones*, 411 U.S. 130, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (specific tribal activity subjected to state tax laws); *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) (state fish trap regulations applied). Neither does this brief suggest that tribal sovereign immunity means a bar to certain state taxes for on-Indian Country activity. *Citizen Band*, 111 S.Ct. at 912 (tribe has obligation for collection of state cigarette tax on sales to non-tribal members on Indian Country).

This brief makes little mention of the Oklahoma Court of Civil Appeals' opinion which decides this case. This is so because the Oklahoma Court of Civil Appeals simply deferred to the Oklahoma Supreme Court's decision in *Hoover*. Thus this brief focuses on *Hoover*, and its predecessor cases, rather than making an extensive analysis of the Oklahoma Court of Civil Appeals' opinion.

A.

Only Congress Has the Power to Regulate Indian Commerce And Tribal Immunity.

Tribal immunity was most recently reviewed in *Citizen Band*, 111 S.Ct. at 912. There, Oklahoma asked this Court to limit the immunity doctrine to permit it to recover a money judgment against an Indian tribe. Oklahoma sought to recover damages for uncollected state cigarette taxes upon

sales made on Indian Country to non-tribal members. This Court determined that sovereign immunity did not excuse the tribe from the obligation to assist in collection of the tax. But, immunity did bar Oklahoma's effort to obtain a judgment against the tribe. *Id.* at 911.

This Court recognized that Congress has never abandoned the immunity doctrine, although it has always been at liberty to do so. Rather, this Court noted, "Congress has consistently reiterated its approval of the immunity doctrine." Citing Congress' pursuit of its "overriding goal" of encouraging tribal self-sufficiency and economic development, this Court concluded that "under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." *Id.* at 910.

This Court also holds that, with the adoption of the Constitution, Indian relations became the "exclusive province of federal law." *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). The Constitution expressly grants to Congress the power to regulate Indian commerce. This is a considered change from the Articles of Confederation. That document attempted to divide regulation of Indian Commerce between the States and the central government. This division was unworkable and thus it was changed.¹⁰

¹⁰Madison cited as one of the deficiencies of the Articles of Confederation its effort to leave some control over Indian commerce to the states. The Articles limited the central government's authority to "Indians, not members of the States" and required that any regulation of

(continued...)

Congress, in its exercise of power under the Indian Commerce Clause, and, for a period of time, under the Treaty Clause, has been the sole source of federal policy for Indian affairs. *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (federal power over Indian affairs derives from regulating Indian commerce and from treaty making).¹¹ Congress' power over Indian affairs is described by this Court as "plenary." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977). Congress itself recognizes that the Constitution grants it plenary power over Indian affairs. 25 U.S.C. § 4101(3).

In the exercise of this plenary power, Congress upholds the federal government's unique responsibility to tribes by creating and implementing a tribal self-determination policy. 25 U.S.C. § 450(a) Congress supports and assists Indian tribes to develop strong and stable tribal governments that can operate quality programs and economies within tribal communities. 25 U.S.C. 450(b).

Congress' "overriding goal" of encouraging tribal self-sufficiency and economic development emphasizes both tribal governments and the fact that "tribal sovereignty is

¹⁰(...continued)

Indian commerce not "violate or infringe upon the legislative right of any state within its own limits." See *The Federalist Papers*, No. 42, p. 269, (C. Rossiter, ed. 1961).

¹¹Federal power over Indian tribes has also been attributed to the rights derived from discovery and conquest. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 75 S. Ct. 313, 317, 99 L.Ed. 314 (1955).

dependent on, and subordinate to, only the Federal Government." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 107 S.Ct. 1083, 1087, 1092, 94 L.Ed.2d 244 (1987), citing *Colville*, 100 S.Ct. at 2081. As a part of this emphasis upon tribal governments, Congress recognizes that the United States' trust responsibility includes the protection of tribal government sovereignty. 25 U.S.C. § 3601(2).

Tribal sovereignty includes the doctrine of tribal immunity. *Citizen Band*, 111 S.Ct. at 909. The United States and this Court have repeatedly and consistently recognized that Indian tribes have the common-law immunity from suit that was traditionally enjoyed by sovereign powers. *Santa Clara*, 98 S.Ct. at 1677 citing *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919); *United States v. USF&G*, 309 U.S. 506, 60 S.Ct 653, 84 L.Ed. 894(1940); *Citizen Band*, 111 S.Ct. at 909.

Tribal immunity means that unless court jurisdiction is created by Congressional or tribal consent to suit, any attempted exercise of judicial power over a tribal sovereign is void. *USF&G*, 60 S.Ct. at 656. Jurisdiction, or power, over a sovereign is not an inherent power of the sovereign's court. Rather, it is a power created in the court by the sovereign's own consent to suit.

Tribal immunity is an inherent aspect of Indian tribes' powers of limited sovereignty which has never been extinguished by Congress. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978), citing F. Cohen, *Handbook of Federal Indian Law* 122

(1945). Because it is an inherent aspect of Indian tribal sovereignty, immunity is not a creation of Congress. It is, rather, an inherent aspect of a separate sovereign that pre-existed the Constitution. *Santa Clara*, 98 S.Ct. at 1675, 1677.

B.

Congress Chose to Retain Indian Tribes' Inherent Immunity To Suit.

Although tribal immunity is not a Congressional creation, Congress is vested with authority to create and define jurisdiction over an Indian tribe by giving its consent to suit. *Santa Clara*, 98 S.Ct. at 1677; *Three Affiliated Tribes*, 106 S.Ct. at 2313.

Legislative reform of sovereign immunity of states and local governments is commonplace. These legislative reforms create some governmental liability, but also protect sovereigns from unlimited exposure, asset seizure and executions that could interfere with the operation of the government. Permissible claims are restricted and are defined in such a way as to avoid governmental policy being tested in damage suit litigation.¹²

¹²See e.g. 51 O.S. § 151 *et seq.* (Adopting the doctrine of sovereign immunity for Oklahoma, then providing detailed description of permissible suits against Oklahoma, limiting total liability to a set dollar amount, eliminating punitive damages and regulating the means of enforcing judgments); 5 Vern. Tex. Code Ann. § 101.001 *et seq.* (permitting limited suits, limiting extent of liability, excluding punitive (continued...))

Tribal immunity has also been analyzed. Congress has reviewed the tribal immunity doctrine and has consistently reiterated its approval. *See Citizen Band*, 111 S.Ct. at 910, *citing* the Indian Financing Act, 25 U.S.C. § 1451 *et seq.* and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* Congress has even specifically stated that nothing in the Indian Self Determination Act was to be construed as "affecting, modifying, diminishing or otherwise impairing immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 450n(1). Tribal immunity is not a forgotten and untested remnant of common law. Instead, it is a considered part of federal policy, as Congress exercises its plenary powers over Indian affairs.

If Congress decides not to retain tribal immunity as a part of its self-determination policy, then Congress may do so. "Congress knows how to limit the sovereign immunity of others when it wants to." *In re Greene*, 980 F.2d 590, 594, n. 3 (9th Cir. 1992).

¹²(...continued)

damages and regulating methods of collecting judgments); Kansas Stat. Ann. § 75-6101 (authorizes limited suits, limits the amount of damages, eliminates punitive damages, regulates methods of enforcement of judgments) 28 U.S.C. § 1602 *et seq.* (recognizing that foreign states are immune from the jurisdiction of the courts of the United States, and courts of the states, except for specified suits; limiting punitive damage claims; exempting foreign states from attachment, arrest and execution, except for designated classes of property.)

**Congress' Decision to Retain Tribal
Immunity is Backed by
Compelling Economic Considerations.**

In order to make its policy of self-determination function, Congress' goal is to create working tribal governments. *Cabazon*, 107 S.Ct. at 1092. Yet, because Congress' self-determination policy is relatively young,¹³ most tribal governments are new at the role Congress created for them.

Fledgling governments view immunity as necessary for survival. *See Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1187, 59 L.Ed.2d 416 (1979) (the heavily indebted post-Revolutionary states thought immunity was "a matter of importance."); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. ___, 116 S.Ct. 1114, 1148, 134 L.Ed. 252 (1996) (Eleventh Amendment adopted to limit federal jurisdiction over suits against the relatively young state governments).

Both Congress and this Court recognize that the expense of litigation would impose "serious financial burdens" on already "financially disadvantaged tribes." *Santa Clara*, 98 S.Ct. at 1680, n. 19 *citing* 1965 Hearings 131, 175; Summary Report 1679; House Hearings 69 (remarks of the Governor of San Felipe Pueblo). As the

¹³Comprehensive legislation to reform major federal service programs began in the early 1970's. Cohen, Felix S., *Handbook of Federal Indian Law*, (1983 ed.) p. 181.

experience with the immunity doctrine in this country shows, governments reform their immunity only after they obtain economic strength and maturity necessary to handle financial burdens. Protection of newly developing tribal governments from the costs and risks of litigation is a compelling concept to Congress. Certainly, such protection is familiar to this country's history and was key to the development of strong national, state and local governments.

Kiowa was stripped of its immunity in this case and its experience proves that immunity is vital to a tribe's existence. Manufacturing Technologies' suit, along with the related suits, have resulted in judgments, including interest and fees, that total more than \$1,500,000.00.¹⁴ This amount is greater than Kiowa's 1996-1997 annual budget. Could any sovereign be expected to survive such a catastrophe?

The burden of these judgments is not theoretical. Kiowa had its tribal oil and gas severance taxes seized by state court post judgment remedies. Its federal program funds were frozen by state court garnishment. Also, and perhaps more incredibly, Kiowa was enjoined from enforcing its own tribal tax laws in Indian Country subject to its

¹⁴In *Hoover*, the judgment now equals \$307,425.39. In *JB Investment v. Kiowa Tribe of Oklahoma*, No. 87,032, Okla. Supreme Ct., the judgment now equals \$306,945.67.41. In *Carl E. Gungoll Exploration Joint Venture v. The Kiowa Tribe of Oklahoma*, No. 87,031, Okla. Supreme Court., the judgment now equals \$70,141.51. In *Aircraft Equipment I*, the judgment now equals \$379,327.70.

jurisdiction.¹⁵ If a sovereign can no longer tax or enforce laws, then what remains of the sovereign?

Garnishment of federal funds could shut down the federal programs which Congress chose to enact. Seizure of Kiowa's tax revenues takes monies that are needed to pay salaries to tribal government employees, maintain tribal real and personal property, supplement federal-tribal programs and operate housing, education and job training programs. (See cert. pet. appendix at p. 24, in *Kiowa Tribe of Oklahoma v. Aircraft Equipment Company*, No. 97-216, United States Supreme Court.) This seizure of tribal funds infringes upon and invades Kiowa's right to self-government.

¹⁵Seizure by creditor's bill of Kiowa's oil and gas severance tax was upheld, along with the issuance of an injunction prohibiting Kiowa from enforcing its tribal tax lien law, in *Aircraft Equipment II*, 939 P.2d at 1149 (Okla. 1997). Garnishment of the oil and gas severance tax is on appeal in *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 85,272, Okla. Supreme Ct.

Post-judgment garnishments have frozen federally appropriated funds intended for various social programs under 25 U.S.C. § 450(a) *et seq.* (Indian Self-Determination and Education Assistance Act) and funds intended for various tribal governmental purposes under 25 U.S.C. § 1401 *et seq.* (Indian Tribal Judgment Funds Use and Distribution Act) *Carl E. Gungoll Exploration Joint Venture v. The Kiowa Tribe of Oklahoma v. Anadarko Bank & Trust Co., Garnishee*, No. CIV-96-2059-T, United States District Court for the Western District of Oklahoma (before removal, CJ-90-10166, District Court of Oklahoma County); *Hoover v. The Kiowa Tribe of Oklahoma v. The First National Bank of Mountain View, Oklahoma, Garnishee*, No. CIV-96-1624L, United States District Court for the Western District of Oklahoma (before removal, No. CJ-91-667, District Court of Oklahoma County). The federal program funds have now been recovered. The seizure of the oil and gas severance tax, along with the injunction prohibiting Kiowa from enforcing its own laws, is ongoing.

**Oklahoma Cannot Destroy Tribal
Immunity By Making It A "State Law Question."**

Although Congress uses tribal immunity to carry out its policy of self-determination, the Oklahoma Supreme Court produced a theory that allows it to disregard tribal immunity. Oklahoma reached this unique result even though neither the tribe nor Congress consented to suit and even though the tribe expressly reserved all of its sovereign rights in the disputed transaction. Oklahoma ignores the fact that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. *Colville*, 100 S.Ct. at 2081. Oklahoma also completely disregards the proposition that "tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes*, 106 S.Ct. at 2313.

The Oklahoma Supreme Court's rationale has its footing in *Lewis v. Sac and Fox Tribe*, 896 P.2d 503 (Okla. 1994) *cert. denied* ____ U.S. ____, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995). *Lewis* found that Oklahoma had jurisdiction over an individual's suit against a tribal housing authority. The suit was over the conveyance of housing authority land to the individual. The Oklahoma Supreme Court decided that "[o]nly that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible

state court cognizance." *Lewis*, 896 P.2d at 508.¹⁶ Because *Lewis* determined that the defense of tribal immunity had been "abandoned," it did not deal with the concept that jurisdiction over an immune tribe may be created only by either a Congressional or tribal consent to suit. *Lewis*, 896 P.2d at 511, n. 59.

Lewis concentrated upon the idea that, under our system of dual sovereignty, a state's jurisdiction is concurrent with federal jurisdiction, unless that jurisdiction is ousted by an affirmative act of Congress. *Lewis*, 896 P.2d at 509-510. Apparently, the fact that Congress had not passed statutes to create tribal immunity was understood by the Oklahoma Supreme Court to mean that there was no concept of tribal immunity to limit its jurisdiction. Because *Lewis* failed to recognize that a court's power over an immune tribe is created only by Congressional or tribal consent to suit, *Lewis* left the Oklahoma Supreme Court with an overly broad concept of its own jurisdiction.

¹⁶The *Lewis* rationale has some relation to the Oklahoma Supreme Court's reasoning in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (*Seneca-Cayuga I*) (finding state residuary jurisdiction interstitially over tribal gaming upon tribal land, in the absence of preemption by Congressional legislation or infringement upon tribal self-government.) *Seneca-Cayuga I* resulted in *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) (*Seneca-Cayuga II*) where the state prosecution of the remanded action in *Seneca-Cayuga I* was enjoined because Oklahoma lacked jurisdiction over an Indian tribe as a matter of supreme federal law.

Next, the Oklahoma Supreme Court decided one of the actions related to this case, *Hoover*, 909 P.2d at 62.¹⁷ In *Hoover*, an individual sued Kiowa in state court upon a promissory note that was said to have been executed outside Indian Country. There was neither Congressional nor tribal consent to suit. The note contained the same express clause which stated that tribal sovereign rights were not waived. The Oklahoma Supreme Court returned to its *Lewis* decision for the idea that, in the absence of a Congressional ouster of its jurisdiction, Oklahoma had "inherent concurrent jurisdiction." *Hoover*, 909 P.2d at 61.

In *Hoover*, unlike *Lewis*, the court was faced with a clearly asserted defense of tribal immunity to suit. Kiowa repeatedly contended that Oklahoma had no jurisdiction because there was no tribal or Congressional consent to suit. To construct a response, the Oklahoma Supreme Court began with the proposition that state courts may decide the merits of a tribal immunity defense and cited *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L. Ed. 2d 924 (1989). Oklahoma then drew upon *Nevada v. Hall* for the idea that a sovereign's immunity was not binding in another sovereign's court, but, that the forum sovereign may apply its own laws to decide the immunity defense. *Hoover*, 909 P.2d at 62. It concluded that Oklahoma's obligation to honor a tribal immunity defense was solely a matter of comity. *Hoover*, 909 P.2d at 61-62, citing *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 545 (1988).

¹⁷*Hoover* was a suit upon one of the promissory notes in the series of promissory notes Kiowa gave to purchase shares of Clinton-Sherman Aviation, Inc. *Hoover*, 909 P.2d at 60.

cert. denied 490 U.S. 1029, 109 S.Ct. 1767, 104 L.Ed.2d 202 (1989).

Because Oklahoma modified its own immunity to suit, the Oklahoma Supreme Court reasoned that Oklahoma had no obligation to respect tribal immunity. By using comity, the *Hoover* court tried to justify the use of Oklahoma law and the avoidance of supreme federal law.

Following *Lewis* and *Hoover*, the Oklahoma Supreme court has stated its position repeatedly. It continues to do so even when two of its own members pointed out that Oklahoma's position directly contradicts the holding of the Court of Appeals for the Tenth Circuit in *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995). In *Sac & Fox*, the Tenth Circuit held that a tribe is immune from suit in state court regardless of whether activity occurs outside Indian Country. *Id.* at 1065. The dissent in *Aircraft Equipment I* stated that the "majority opinion contravenes the mainstream of contemporary sovereign immunity jurisprudence. . . [and] is certainly contrary to *Sac & Fox* (citation omitted)." *Aircraft Equipment I*, 921 P.2d at 362 (Kauger, J. and Summers, J., dissenting).

The majority in *Aircraft Equipment I* tried to avoid the conflict with the Tenth Circuit and explained ". . . a federal court's [the 10th Circuit] pronouncement on a state law question lacks the force of authority in that it cannot bind this Court. (citation omitted). We follow the jurisprudence of *Hoover* and *Lewis* because in both cases certiorari was denied by the Supreme Court of the United States." *Aircraft Equipment I*, 921 P.2d at 361.

Although the opinion is not clear, apparently the "state law question" is Oklahoma's decision that it has "inherent concurrent jurisdiction" over an Indian tribe and that it can use comity to apply state law to decide the extent of the tribe's immunity. The *Hoover* holding was relied upon also in *First Nat. Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996).

E.

An Indian Tribe Is An Immune Sovereign Anywhere In The United States – Even In Oklahoma; Supreme Federal Law Controls Waivers of Tribal Immunity.

The Oklahoma Supreme Court's refusal to honor Kiowa's tribal immunity draws heavily upon the *Nevada v. Hall* idea that an independent sovereign may apply its own law to measure its jurisdiction over another sovereign. *Hall* treats sister states as independent sovereigns that are free to determine their own policy concerning another state's claim of immunity. *Hall* finds that this freedom exists because there is no Constitutional restraint upon states' powers over other states.

The *Hall* analysis does not transfer to federal law on Indian commerce and affairs for two reasons: (1) Indian tribes are not foreign sovereigns and (2) the Indian Commerce Clause restrains state power over Indian tribes.

Indian tribes are not foreign or independent sovereigns, as *Hall* suggests is the case for sister states. Instead, Indian tribes are "domestic dependent nations". *Citizen Band*, 111 S.Ct. at 909. With respect to Indian tribes, the United States has a unique trust responsibility which compels the support and protection of tribal sovereignty. 25 U.S.C. § 4101(3); 25 U.S.C. § 3601(2). The nature of this federal commitment to Indian tribes has become a significant consideration in defining tribal sovereignty. When tribal sovereignty is measured, this consideration is perhaps more significant than the question of "on or off Indian country".¹⁸

¹⁸While decisions of this Court on tribal immunity have not turned upon the "on-or-off" Indian Country issue, lower court decisions have considered the issue in reaching decisions in tribal immunity:

1. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968) (Wrongful death action barred by Tribe's sovereign immunity, even though alleged tort took place outside of the exterior boundaries of the Tribe's reservation.)

2. *North Sea Products v. Clipper Seafoods Co.*, 595 P.2d 938, 939 (Wash. 1979) (Tribal immunity extends to tribal "commercial enterprise outside the boundaries of the reservation").

3. *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983) (Breach of contract action arising out of business transaction initiated off-reservation barred by sovereign immunity; cited by Justice White in dissent from denial of certiorari in *Padilla*, 490 U.S. 1029 (1989), as indicating off-reservation immunity).

4. *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988) (Tribe not entitled to sovereign immunity for off-reservation activities), *cert. denied*, 490 U.S. 1029 (1989).

5. *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989) (Sovereign immunity not applicable to tribal business engaged in off-reservation activities not connected with "tribal self-government or the promotion of tribal interests.").

(continued...)

The crossing of state or tribal boundaries is no longer a single inquiry test to analyze tribal sovereignty. This Court has long abandoned the *Worcester v. Georgia*, 6 Pet. 515, 516, 8 L.Ed.2d 483 (1832), thought that reservation and state boundaries formed a wall which laws cannot cross. Determining issues based solely upon geographic boundaries was proven inadequate and it should not be given new life.

¹⁸(...continued)

6. *Greene*, 980 F.2d at 594 (9th Cir. 1992) ("Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial components."), *cert. denied sub. nom., Richardson v. Mount Adams Furniture*, 510 U.S. 1039 (1994).

7. *Elliott v. Capital Int'l. Bank & Trust*, 870 F.Supp. 733 (E.D. Tex. 1994) (Bank chartered, governed, and owned by Indian tribe protected by sovereign immunity; bank did not waive immunity by engaging in extensive off-reservation commercial activities), *aff'd*, 102 F.3d 549 (5th Cir. 1996).

8. *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. App. 1995) (Tort claim for injury suffered at Tribe's ski resort held barred by sovereign immunity, even though most of resort located off of the Tribe's reservation, since the actual injury took place on a part of the resort within the Tribe's reservation), *cert. denied*, 903 P.2d 844.

9. *Federico v. Capital Gaming Int'l.*, 888 F.Supp. 354 (D.R.I. 1995) (Contract claim against Tribe held barred by sovereign immunity even though performance of the contract was to take place off of the reservation).

10. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1065 (10th Cir. 1995) ("Without an explicit waiver, the Nation is immune from suit in state court—even if the suit results from commercial activity occurring off the Nation's reservation."), *cert. denied*, ___ U.S. ___, 116 S.Ct. 57.

11. *Gayle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996) (Civil claim arising out of conduct of Indian business entity, some of which occurred outside of Indian country, held barred by sovereign immunity), *petition for cert. filed*, 65 U.S.L.W. 3539 (Jan. 29, 1997) (No. 96-1215).

The "on-or-off" Indian Country issue is more usually used as a tool to analyze conflicts between state and tribal authority. See *Mescalero*, 93 S.Ct. at 1275 (off-reservation ski resort subject to state gross receipts tax, but exempt from state use taxes because of 25 U.S.C. § 465); *Organized Village of Kake*, 82 S.Ct. at 571 (within Alaska waters, Alaska conservation law applies to Indian fishing). Thus in some fact situations, the location of a taxable event or the location of an object of state regulation is a proper judicial consideration to use to decide the relative interests of a state, a tribe and the federal government.

The point of this case is neither a state tax nor a state regulation. The point of this case is whether there is any legal basis for Oklahoma's disruption of both Congressional policy and an Indian tribe by rendering and enforcing a judgment against the tribe. Seizing tribal tax revenues, freezing federally appropriated funds and enjoining enforcement of tribal law upon tribal land is virtually a complete infringement upon tribal self-government. A state has no such power with respect to an Indian tribe.

The Constitution's grant to Congress of power over Indian commerce and affairs, Congress' protection of tribal sovereignty and immunity, and Congress' goal to build strong tribal governments cannot be overcome by a private litigant who proposes that supreme federal law and Congressional policy are subject to state judicial frustration within the geographical boundaries of Oklahoma.

Congress is entitled to significant judicial deference when it exercises its Constitutionally assigned powers over

Indian commerce. This Court has recognized that, in the absence of clear indication of legislative intent, this Court should "tread lightly" in an area involving tribal sovereignty and the plenary authority of Congress. *Santa Clara*, 90 S.Ct. 1678. With respect to tribal immunity, Congress' own specific statutory preservation of tribal immunity, 25 U.S.C. § 450n(1), signals a legislative intent that counsels something beyond treading lightly. Oklahoma must be made to recognize the unique status of Indian tribes and respect Congress' exercise of its plenary authority.

Hoover's reliance upon the *Hall* reasoning is fundamentally wrong for yet another reason. The Indian Commerce Clause is a Constitutional restraint upon state power. Power over Indian commerce is assigned to Congress and thus cannot remain in a state. The lack of a restraint upon state power over sister states was key to the *Hall* opinion. Oklahoma can use *Hall* only if it can ignore the Constitutional restraints upon its power.

Hoover does not disregard all aspects of an Indian tribe's immunity, though. It does, at least implicitly, recognize that if Kiowa enters Oklahoma for commerce, it enters as an immune sovereign. If a tribe's commerce within a state involves concepts of extraterritoriality, then immunity has an extra-territorial aspect. *Greene*, 980 F.2d at 594 citing *Hall*, 99 S.Ct. at 1182. Oklahoma's recognition of this extra-territorial aspect of Kiowa's immunity is evident from the fact that *Hoover* determines whether, or to what extent, to respect Kiowa's defense of immunity. Thus, if Kiowa does some commerce within Oklahoma, even Oklahoma recognizes that Kiowa has inherent immunity to suit. The

question posed, then, is, "How can Kiowa lose its immunity?" When Oklahoma answers that question, Oklahoma encounters Constitutional restraints upon its power.

If Oklahoma decides how a federally recognized Indian tribe can lose its immunity, then it must accept that the laws of the United States and the laws of the several states form one system of jurisprudence, which is the law of the land for the states. *Howlett*, 110 S.Ct. at 2438. Applying this one system of jurisprudence is not an issue of comity, as *Hoover* proposes. "The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity." *Couder d'Alene Tribe*, 65 U.S.L.W. at 4544. Oklahoma may not use comity to decide which part of federal law it will recognize.

Federal law is absolutely clear on how a tribe may lose immunity. Unless there is Congressional or tribal consent to suit, Indian tribes are immune. *Santa Clara*, 98 S.Ct. at 1677; *Citizen Band*, 111 S.Ct. 910 (*USF&G* reaffirmed; Oklahoma Tax Commission's request to modify *USF&G* rejected). To be effective, a waiver of immunity must be "unequivocally expressed." *Santa Clara*, 98 S.Ct. at 1677. There is no other means under federal law by which a tribe can be stripped of its immunity.

Because tribal immunity is an established matter of supreme federal law, the law of Oklahoma is that, an Indian tribe is immune from suit unless there is a proper Congressional or tribal consent to suit. "[T]he Supremacy

Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or refusal to recognize the superior authority of its source." *Howlett*, 110 S.Ct. at 2240. Here, Congress has not consented to suit and, not only is there no tribal consent, there is even an express reservation of all sovereign rights. Oklahoma's conclusion to use comity as a mechanism to ignore supreme federal law is plainly wrong. Oklahoma must recognize that Kiowa is immune to suit, that Oklahoma has no jurisdiction and that this suit must be dismissed.

Requiring Oklahoma to follow supreme federal law and recognize tribal immunity is appropriate. It respects a clear Constitutional allocation of power over Indian commerce to Congress. U.S. Const. art. I, § 8, cl. 3. It is consistent with the clear mandate of the Supremacy Clause that the "Judges in every state shall be bound" by the "Supreme Law of the Land." U.S. Const. art. VI, cl. 2. It preserves from state disruption Congress' pursuit of its policy of Indian self-determination. It permits Congress to use tribal immunity to build tribal governments, just as immunity was used by developing governments in this country's history.

The Constitutional allocation of power to Congress, the Supremacy Clause and Congress' pursuit of a comprehensive policy of Indian affairs, make it plain that any alteration of tribal immunity is a legislative matter. Congress, acting under powers delegated to it by Art. I, sec. 8, cl. 3 may, if it so chooses, reform tribal immunity. Congress may also elect to delay such reforms until it believes tribal governments are able to respond to a loss of

immunity or Congress may leave the reforms to the tribes themselves.

If the location of commercial contacts do justify some weight when applying the tribal immunity doctrine, then Congress is free to pursue that idea in the shaping of a comprehensive policy. Until Congress has done so, it is necessary to respect the fact that Congress now uses tribal immunity to shield both tribes and its self-determination policy from disruption by state judiciary. Congress' policies must apply nation-wide and not simply upon Indian Country.

Leaving reform of immunity to Congress is desirable for a practical reason. By legislation, Congress has the power to create a comprehensive policy that resolves relevant competing interests. Congress can balance the interests of tribes to preserve their ability to govern against the interest of potential claimants. This balancing requires an intricacy that is difficult to achieve within the confines of a court decision.¹⁹ The disruption of Kiowa's government that resulted from *Hoover* evidences an uneven tilting that may be avoided in the legislative process.

¹⁹For an interesting judicial solution to the problem of eliminating immunity, but preserving governments from economic disruption, see *Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983). The Oklahoma Supreme Court recognized that abrogation of Oklahoma's immunity, "should be done by the Legislature and not the Courts" but proceeded to abrogate it anyway. It then replaced immunity with a "finding and determination" that looks and reads like a statute designed to reform immunity. *Vanderpool*, 896 P.2d at 1156-1157. The effectiveness of the *Vanderpool* decision was deferred for over a year to give the legislature time to react.

It is important to understand the full extent of Oklahoma restrictions on tribal immunity. As a practical matter, Kiowa will lose virtually all immunity. Because of the nature of Kiowa's remaining lands -- small plots that are checker-boarded through rural southwestern Oklahoma²⁰ -- it is difficult, at best, to conduct any meaningful commerce limited solely to that land. Virtually any commerce will involve, for banking services if nothing else, significant contacts off of Kiowa's land. Doubtlessly, virtually any contact outside Indian Country can, and will be used under the Oklahoma approach to find jurisdiction over an immune tribe. Most, if not all, of the other thirty-five federally recognized Indian tribes within Oklahoma will encounter the same problem. All of these tribes, like Kiowa, were left with small land bases after Congress allotted the former reservation lands.

Hoover is fundamentally wrong when it fails to recognize constraints upon state power that arise from the Indian Commerce clause and when it equates Indian tribes to independent sovereigns. *Hoover* is wrong as to the basic nature of tribal sovereignty and as to the extent of state power.

²⁰The lands are described in the Statement of the Case, p. 4.

II.

LIMITS ON STATE COURT JURISDICTION OVER INDIAN TRIBES DO NOT REQUIRE AN EXPLICIT OUSTER BY CONGRESS.

The Oklahoma Supreme Court created an avenue for judgment creditors and the state judiciary to join Congress in its exercise of authority over Indian affairs. By seizing Kiowa's governmental funds and by enjoining enforcement of tribal law upon Kiowa's Indian Country, judgment creditors and the state judiciary assert control over tribal government. The theory supporting this is that, because Congress has not ousted Oklahoma courts from jurisdiction over Indian tribes, Oklahoma courts thus must have inherent concurrent jurisdiction.²¹

The power to regulate Indian commerce is plainly delegated to Congress by the Indian Commerce Clause, Art. I, sec. 8, cl. 3, United States Constitution. The Indian Commerce Clause, and to some extent, federal actions under the Treaty Clause, Art. II, sec. 2, have resulted in Congress having plenary authority over Indian tribes. *United States v. Wheeler*, 98 S.Ct. at 1084. The power is so extensive as to make Indian relations the exclusive province of federal law. *Oneida*, 105 S.Ct. at 1251. States have been divested of virtually all authority over Indian commerce and Indian tribes in that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government

²¹*Lewis*, 986 P.2d at 509.

than does the Interstate Commerce Clause." *Seminole Tribe of Fla.*, 116 S.Ct. at 1126.

States have power "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 1854, 131 L.Ed.2d 881 (1995). The Constitutional transfer to the federal government of power over Indian commerce leaves no need for Congress to oust state court jurisdiction over Indian Commerce with specific legislation.

CONCLUSION

This case should be reversed with instructions that it be dismissed because, in the absence of a waiver of tribal immunity, there is no jurisdiction in Oklahoma courts.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

vs.

MANUFACTURING TECHNOLOGIES, INC., an Oklahoma
corporation,

Respondent.

*On Writ of Certiorari to the Court of Appeals,
Division I, for the State of Oklahoma*

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether an Indian Tribe is immune from suit in a state court arising out of default on a promissory note given to secure economic development outside of Tribal Lands?

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STATEMENT OF THE CASE

Respondent, Manufacturing Technologies, Inc., ("Manufacturing Technologies") generally accepts the completeness and accuracy of the Statement of the Case contained at pages 3 through 10 of Petitioner's Brief. The Statement is burdened by extraneous material relating to collection efforts made by other parties to other litigation against Petitioner, The Kiowa Tribe of Oklahoma, (the "Tribe"). The Tribe acknowledges there has been no collection effort taken against it by Manufacturing Technologies. Any reference to the effect of collection of a judgment against the Tribe is premature, is intended to be prejudicial, and should be disregarded.

Manufacturing Technologies sold stock of Clinton-Sherman Aviation, Inc., an Oklahoma corporation, to the Tribe, taking the Note of the Tribe in exchange for the stock. The Tribe does not dispute that the Note was delivered to Manufacturing Technologies in exchange for the stock outside of Tribal Lands, that the Tribe received the stock outside of Tribal Lands, and that the Note was to be paid by the Tribe outside of Tribal Lands. It is undisputed that the acquired corporation was a commercial enterprise doing business outside of Tribal Lands. It is also uncontroverted that the Tribe made no payments on the Note. (Petitioner's Brief at 6, 7.)

SUMMARY OF ARGUMENT

The District Court of Oklahoma County had jurisdiction to hear the suit on breach of a Promissory Note brought by Manufacturing Technologies, an Oklahoma corporation, against the Tribe. The existence of a possible defense of sovereign immunity did not divest the District Court of its jurisdiction to hear the case. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989).

The Oklahoma Court of Appeals properly affirmed the District Court's judgment in favor of Manufacturing Technologies against the Tribe for the Tribe's default in its obligations under the Promissory Note, relying on the Oklahoma Supreme Court decision in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

Manufacturing Technologies agrees that the federal government has the power to regulate Indian commerce and Indian tribes. It is clear that Congress has such authority under the treaty¹, commerce², and supremacy³ provisions of the United States Constitution and the Laws of Congress adopted thereunder. It is also clear that this authority is not exclusive. *See Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The Tribe is not entitled to the protection of immunity from suit when it goes off Tribal Lands in a commercial venture. It is subject to non-discriminatory state law otherwise applicable to all citizens of the State. *Mescalero Apache Tribe*, *supra* at 147.

Manufacturing Technologies takes issue with the unfounded generalization of the Tribe that regulation of the Tribe is the sole purview of the federal government and that the State therefore must dismiss this action. It claims an immunity not afforded to a sister state (*Nevada v. Hall*, 440 U.S. 410 (1979)), a foreign state (28 U.S.C. § 1602, *et seq.*) or the federal government, *United States v. Winstar Corp.*, ___ U.S. ___, 116 S. Ct. 2432 (1996). The Tribe is not protected by sovereign immunity from suit when it goes off Tribal Lands in a commercial transaction. *Organized Village of Kake*, *supra* at 571; *Mescalero Apache Tribe*, *supra* at 163.

1. U.S. Const. art. II, § 2, cl. 2.

2. U.S. Const., art I, § 8, cl. 3.

3. U.S. Const. art IV, § 3, cl. 2.

PROPOSITION I.

THE DISTRICT COURT OF OKLAHOMA COUNTY HAS JURISDICTION TO HEAR THIS CASE.

The District Court of Oklahoma County has jurisdiction to hear and decide the question of sovereign immunity raised by the Tribe despite the Tribe's protestations to the contrary. *Graham*, *supra*.

In *Graham*, the State brought action against the Cherokee Tribe to recover Oklahoma excise taxes for cigarette sales on Tribal Lands to non-tribal members, and levied on the conduct of bingo games. The case was removed to the United States District Court by the Cherokee Tribe, and the District Court dismissed the action on the basis that the Tribe was immune from suit because of sovereign immunity. The Court of Appeals for the Tenth Circuit affirmed the District Court at 852 F.2d 951. This Court vacated the Court of Appeals affirmance at 108 S. Ct. 481. The Court of Appeals then adhered to its original decision that removal was proper.

The Supreme Court again granted certiorari and held that the possible existence of tribal sovereign immunity did not convert the state tax question into a federal question cognizable only in federal courts citing the "Well-Pleaded Complaint Rule" as discussed in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987).⁴

The Court in *Graham* states that "it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into

4. The Well-Pleaded Complaint Rule provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff master of the claim; "he or she may avoid federal jurisdiction by exclusive reliance on state law."

one which, in the statutory sense arises under federal law," citing *Gully v. First Nat'l. Bank*, 299 U.S. 109 (1936).

In *Graham*, the Court held that "the possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions, and there was no independent basis for original federal jurisdiction to support removal." *Graham*, *supra* at 842.

The cause of action sued upon in the District Court of Oklahoma County was for default on a promissory note, an action cognizable in the state court. That court had jurisdiction to hear the case and to adjudicate the merits of the defense of sovereign immunity raised by the Tribe.

PROPOSITION II.

THE TRIBE IS NOT EXEMPT FROM SUIT FOR ITS ACTS WHEN IT GOES OFF TRIBAL LANDS IN A COMMERCIAL VENTURE.

The Tribe is a federally recognized Indian Tribe. (Petitioner's Brief at 3.) As such it is subject to the provisions of the U.S. Const., art. I, § 8, cl. 3 which provides in part that "the Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes."

Tribal sovereign immunity from suit is a creation of the Supreme Court. *Oklahoma Tax Comm'n v. Citizen Band Potawatomie Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). The Court says at 510, that "a doctrine of tribal sovereign immunity was originally enunciated by this Court, and has been re-affirmed in a number of cases," citing *Turner v. United States*, 248 U.S. 354, 358 (1919), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

This Court may determine that the Tribe is not entitled to sovereign immunity when it goes off tribal lands in a commercial venture.

The *Kake* Court examined the division of jurisdiction and control between the federal government and the states both on and off Tribal Lands, in the context of the enforcement of state criminal laws on reservations and in the regulation of fishing rights. *Organized Village of Kake*, *supra* at 64. Even though the Alaska Statehood Act retained in the United States absolute jurisdiction and control over Indian property, (including the fishing rights subject to the litigation), the Court held that the Tribe's fish-traps were not excluded from application of the state conservation laws. The Court in *Kake* states that the test of whether a state law could be applied on an Indian reservation was whether the application of that law would interfere with reservation self-government, citing *Williams v. Lee*, 358 U.S. 217 (1959).

The Court also states that "*Draper*⁵ and *Williams* indicate that 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." *Organized Village of Kake*, *supra* at 68.

The fish-traps were located off of the Tribe's reservation. The Court says, "State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation." *Organized Village of Kake*, *Id.* at 75.

In *Mescalero Apache Tribe*, *supra*, this Court considered the rights of the State of New Mexico to tax a commercial enterprise operated by the Mescalero Apache Tribe off of its reservation. The State of New Mexico levied a use tax assessment and sales tax on The Sierra Blanca Ski Enterprise, a ski resort

5. *Draper v. United States*, 164 U.S. 240 (1896).

owned and operated by the Tribe on lands leased from the United States Forest Service. The Tribe protested, claiming immunity from taxation by the State on tribal activities conducted outside the boundary of the tribal reservation. The Court says at 147, 148:

At the outset, we reject — as did the state court — the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise “whether the enterprise is located on or off tribal land.” Generalizations on this subject have become particularly treacherous.

The Court further says, at 148, 149:

But tribal activities conducted outside the reservation present different consideration. “State authority over Indians is yet more extensive over activities . . . not on any reservation.” *Organized Village of Kake, supra*, 369 U.S., at 75, 82 S.Ct., at 571. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 298, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968); *Organized Village of Kake, supra*, 369 U.S., at 75-76, 82 S.Ct., at 570-571; *Tulee v. Washington*, 315 U.S. 681, 683, 62 S.Ct. 862, 863, 86 L.Ed. 1115 (1942); *Shaw*

v. Gibson-Zahniser Oil Corp., 276 U.S. 575, 48 S.Ct. 333, 72 L.Ed. 709 (1928); *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). That principle is as relevant to a State’s tax laws as it is to state criminal laws, see *Ward v. Race Horse, supra*, at 516, 16 S.Ct., at 1080, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake, supra*.

Hoover, supra arose out of a transaction contemporaneous to that of Manufacturing Technologies’ transaction with the Tribe. Manufacturing Technologies and Hoover each sold stock in a business enterprise to the Kiowa Tribe taking Promissory Notes from the Tribe in consideration for the stock transfer. In *Hoover*, the Oklahoma Supreme Court first found that the state court had jurisdiction over the merits of a tribal immunity defense to claims arising under state laws, citing *Graham, supra*. “State laws may be applied to Indians, even on reservations, ‘unless such application would interfere with reservation self-government or impair a right granted or reserved by federal laws . . . *Organized Village of Kake, supra*.’ ”

The Oklahoma Supreme Court cited with approval the authority of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). This case also involves state court jurisdiction over a tribe, the Pueblo of Acoma, which entered into a contract with a roofing consultant to supervise roof installation on two projects owned by the pueblo off of its reservation. The New Mexico District Court granted the Pueblo’s Motion to Dismiss based on the sovereign immunity of the Pueblo.

The New Mexico court reversed the District Court on the

basis of comity, *Padilla, supra* at 850, relying on *Hall, supra*. *Hall* examined the jurisdiction of California over the tortious act of an agent of the State of Nevada while in California. *Hall* holds that there is no constitutional provision that prohibits a state's exercise of jurisdiction over a sovereign sister state. *Hall*, 440 U.S. at 426.

The Oklahoma Supreme Court held that since the State of Oklahoma allowed suit against itself, the Tribe was subject to suit and liable for breach of its contract when the contract is entered into outside tribal lands. *Hoover, supra* at 62.

The position of the Tribe regarding state jurisdiction is analogous to that of a foreign state doing business within the boundaries of a state. Congress has legislated limitations on sovereign immunity of foreign states engaged in commercial actions within the United States at 28 U.S.C. § 1602, *et seq.* Section 1602 provides, in part that, "... Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgment rendered against them in connection with their commercial activities ..."

Justice Stevens, in his dissent in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 515 (1991) says:

... Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U.S.C. § 1605(a) ('A foreign state shall not be immune from the jurisdiction for courts of the United States or of the States in any

case ... (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state ...')

* * *

And further, at page 515, ... My purpose in writing separately is to emphasize that the Court's holding in effect rejects the argument that this governmental entity — the Tribe — is completely immune from legal process.

These statutes recognize the territorial limit of sovereignty and unequivocally provide that a foreign state which conducts commercial activities within the United States subjects itself to the jurisdiction of courts of the United States or the States.

The Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. ___, 117 S. Ct. 2028 (1997) says that "Indian Tribes should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity," citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-82 (1991).

The federal government is also bound by its contractual obligation. Claimants sought to recover amounts due them as beneficiaries of federally issued war risk term insurance policies. *Lynch v. United States*, 292 U.S. 571 (1934). The Court held that the federal government may not simply repudiate its contractual obligations. *Id.* at 580.

The defense of sovereign immunity for acts occurring within the jurisdiction of the State is not allowed to a sister state (comity), to a foreign state (28 U.S.C. § 1602, *et seq.*), and is limited in application the United States. The Tribe cannot claim a greater immunity than these instrumentalities.

PROPOSITION III.

THE TRIBE WAIVES ITS SOVEREIGN IMMUNITY WHEN IT ENGAGES IN COMMERCIAL ACTIVITIES OFF TRIBAL LANDS.

The Tribe promised to pay Manufacturing Technologies the sum of \$285,000 according to the terms of the Promissory Note. It voluntarily engaged in a commercial venture off Tribal Lands. It failed to pay and now asserts the defense of sovereign immunity from suit. The Tribe has waived its immunity by its actions.

The Court in *Lynch* states that "When the United States enters contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." The *Lynch* Court further says at 580, that, "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases*, 99 U.S. 700, 719 (1878).

Winstar Corp., *supra* considered the right of the federal government to effectively breach a contract it had entered into by subsequently enacting legislation which made the government's performance of the of the contract impossible. This Court held, by plurality opinion, that the government was liable for damages for the breach. The Court by way of analogy states at 2457, "At the other end are contracts, say, to buy food for the army; no sovereign power is limited by the government's promise to purchase and a claim for damages implies no such limitation. . . So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the

enforcement of the risk allocation raises nothing for the unmistakability doctrine⁶ to guard against, and there is no reason to apply it."

The Note given by the Tribe to Manufacturing Technologies contains the language "Nothing in the Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." JA-14. The Tribe thus gives its solemn promise to pay according to the terms of the Note and then suggests that it will not be liable for breach of the terms of the Note.

The Court, in *Winstar Corp.*, *supra* at 2473, cites *Murray v. Charleston*, 96 U.S. 432, 445 (1878) and *New Jersey v. Yard*, 95 U.S. 104, 116, 117 (1877) for the proposition that a government contract "should be regarded as an assurance that (a sovereign right to withhold payment) will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

"Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound for ever, and the other only for a day? That it was intended to be a part of the contract that the State of New Jersey was, at her option, to be bound or not?" *Yard*, *supra* at 116.

The Tribe must be bound by its promise to pay, freely given in exchange for valuable consideration, and relied on by Manufacturing Technologies.

Had the Tribe required that its promise be made and performed within Tribal Lands perhaps the matter would be different. In this case, when it goes off Tribal Lands, in a purely

6. The canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms. *Id.* at 2457.

commercial venture, it is subject to non-discriminatory state law applied equally to all citizens of the state. *Organized Village of Kake*, *supra* at 75.

The Tribe asserts that immunity from suit is required to protect tribal self government. "A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171, 172 (1973). The limitation on this policy however is evident. This language does not give a right to a Tribe to go off reservation and enforce its laws and protection on the citizens of the state it contracts with.

The Tribe also asserts that Manufacturing Technology could have secured a waiver of the Tribe's supposed immunity from suit by following the requirements of 25 U.S.C. § 81. Manufacturing Technologies is not required to secure a waiver of rights which do not exist off Tribal Lands. If the Tribe wished to be protected by its sovereign immunity, it could have required that execution and performance of the Promissory Note take place on Tribal Lands.

The Tribe asserts that it will be subjected to collection efforts if it is held accountable on its promise to pay. It equates this result to a "complete infringement upon tribal self-government" (Petitioner's Brief at 29). Justice Breyer, in his concurring opinion in *Winstar Corp*, *supra* at 2475, citing *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 24 (1977), "Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes Notwithstanding these effects, the Court has regularly held that

the States are bound by their debt contracts". It is difficult to see how the Court could, in a principled fashion, apply the government's rule in this case without also making it applicable to the ordinary contract case (like the hypothetical sale of oil) which, for the reasons explained above, are properly governed by ordinary principles of contract law. To draw the line — *i.e.*, to apply a more stringent rule of contract interpretation this Court has previously rejected the argument that Congress has "the power to repudiate its own debts which constitute 'property' to the lender, simply in order to save money."

The plurality in *Winstar Corp.*, *supra* at 2459, says "Once general jurisdiction to make an award against the Government is conceded, a requirement to pay money supposes no surrender of sovereign power by a sovereign with the power to contract."

CONCLUSION

The Tribe attempts to arrogate to itself a right of immunity from suit which is not accorded to a foreign government, a State, or indeed, to the United States. It gives its solemn promise to pay, to a citizen of the State of Oklahoma, within the jurisdiction of the State of Oklahoma, and receives the consideration for the Note, and then attempts to avoid its promise based upon its supposed sovereign immunity.

The Tribe would have us believe that its promise to pay is meaningful only if it later decides to honor it. This position is not supported by the Constitution of the United States, congressional enactments, or the decision of this Court.

The judgment of the Court of Appeals, Division 1, for the State of Oklahoma should be affirmed.

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Supreme Court, U. S.

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NO. 96-1037

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996**

**THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe**

Petitioner

v.

**MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation**

Respondent

**On Writ of Certiorari
to the Court of Appeals, Division I
For the State of Oklahoma**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

The power to regulate Indian commerce has been delegated to Congress by the United States Constitution. Art. I, sec. 8, cl. 3. Congress actively exercises this delegated power. This Court consistently recognizes both Congress' role and its policies with respect to Indian tribes and Indian affairs.

Respondent and its *amici* present various theories to suggest that individual litigants and States are not obligated to respect either the delegation of this power to Congress or

Congress' exercise of its delegated powers. Largely, these theories key upon the fact that Kiowa engaged in commerce off of its tribal territory. They attempt to exploit quotes from this Court's decisions on issues other than tribal immunity to suit. These theories fail to recognize Congress' delegated power, and the Supremacy Clause and, indeed, are not supported by the authorities cited by Respondent and its *amici*.

ARGUMENT

I.

THE ONLY SOURCE OF COURT POWER OVER AN INDIAN TRIBE IS CONSENT TO SUIT BY EITHER CONGRESS OR THE TRIBE.

Neither Respondent nor *amici* can avoid the fact that the States, in the Constitution, delegated control of Indian commerce and affairs to Congress. This delegation is so extensive that the States "... have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. ___, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Congress is the proper forum for dealing with issues concerning Indian commerce and Indian affairs.

State courts are the proper forum *only* if either Congress or the tribe consents to suit. *See, United States v. U.S.F. & G.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed.2d 894 (1940) (consent alone gives jurisdiction to adjudge against a

sovereign; absent that consent, the attempted exercise of judicial power is void.) In this case, there is no consent to suit. In fact, there is even an express reservation of sovereign rights by Kiowa.

It is important for States to respect this delegation of power to Congress because Congress actively exercises its delegated power. Congress formulates policy and, with a number of federal programs, pursues goals as to Indian tribes. *See e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*; Indian Financing Act, 25 U.S.C. § 1451 *et seq.*; Indian Gaming Regulation Act, 25 U.S.C. § 2701 *et seq.*; Indian Tribal Judgment Funds Use or Distribution Act, 25 U.S.C. § 1401 *et seq.* Congress' power, policy and programs should not be disrupted by state courts which claim authority over Indian commerce and affairs.

Congress' position on tribal immunity to suit is clear. Congress recognizes tribal immunity to suit, has consistently refused to modify tribal immunity to suit, *Oklahoma Tax Comm'n. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), and, on two occasions, has even specifically protected tribal immunity to suit. *See* 25 U.S.C. § 450(n) (nothing in this Act shall be construed as (1) affecting, modifying, diminishing or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe;) and 25 U.S.C. § 3746 (nothing in this chapter shall be construed to affect, modify, diminish or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes).

This Court has consistently recognized both Congress' prerogative and position on tribal sovereignty. *See, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978) (a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.) Here, there is no question about the legislative intent of Congress. Congress wishes to preserve tribal immunity to suit.

If Respondent and *amici* disagree with Congressional policy, it is Congress, and not the state courts, that they should ask to change it. As recently as September of 1997, Congress considered limiting tribal immunity to suit. The Department of the Interior and Related Agencies Appropriations Bill, 1998, H.R. 2017, at § 120, as reported to the Senate, provided that tribes which accepted certain funds from the Bureau of Indian Affairs would waive any claim of immunity to suit. That provision was eliminated from the bill after agreement by the Chairman of the Indian Affairs Committee to hold hearings on tribal immunity to suit by April 30, 1998. Cong. Rec. § 9388-9399 (Sept. 16, 1997). Congress is keenly aware of tribal immunity to suit and is currently working on the issue. *Amici* States and private litigants have an immediate opportunity to make their views known to Congress. Should the need for change be apparent, Congress will respond as appropriate.

The plain delegation to Congress of power over Indian commerce and Congress' active attention to tribal immunity to suit make it obvious that Oklahoma courts have assumed powers that they do not have. The Oklahoma courts acted inconsistently with Congress in an area in which

Congress has virtually exclusive authority. Congress did not consent to this suit. Kiowa not only did not consent, but, it even reserved its sovereign rights. This judgment must be vacated for lack of jurisdiction.

II.

THIS COURT'S DECISIONS PLAINLY AND CONSISTENTLY RECOGNIZE TRIBAL IMMUNITY TO SUIT.

Respondent and *amici* draw upon several of this Court's decisions to suggest that this Court created, in state courts, the power to join Congress in the regulation of Indian commerce and affairs, particularly if the tribe is acting off of Indian Country, or, is sued in a state court. None of these decisions go that far. In fact, this Court repeatedly upholds tribal immunity to suit and specifically recognized tribal immunity to suit where a State sought to regulate off-reservation fishing. *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed. 2d 667 (1977) (*Puyallup III*).

If a tribe is sued in a state court, then Respondent argues that *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989), holds that the state court has jurisdiction "to hear the case and to adjudicate the merits of the defense of sovereign immunity raised by the Tribe."¹ Respondent plainly intends this to mean that *Graham* gives a state court authority to define the nature of

¹Brief for Respondent ("Resp. Br.") at p. 3.

tribal sovereignty and tribal immunity to suit. *Graham* does not grant the States such authority. *Graham* merely holds that a tribal immunity defense does not make a suit in state court removable to federal court. *Graham* applies the "well-pleaded complaint" rule to determine removability, even with respect to suits against Indian tribes.

Because *Graham* leaves a suit against an Indian tribe in state court, the state court necessarily must make rulings in response to the tribal immunity defense. It is the extent and reach of the state court rulings that created the problem in this case. Because the States delegated power over Indian commerce to Congress, a state court's ruling in response to a tribal immunity defense can be only a ruling on its own jurisdiction.

In this case, and in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995) cert. denied ____ U.S. ____, 116 S.Ct. 1675, 134 L.Ed.2d 779 (1996), the Oklahoma court concluded that, instead of ruling on the limits of its own jurisdiction, it could define the extent of tribal immunity to suit. In its decision, the Oklahoma court abrogated tribal immunity to suit. But, a state court has no such authority. This is so because tribal sovereignty is subordinate only to the federal government, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980) and tribal immunity may not be diminished by the States. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S.Ct. 2305, 90 L.Ed.2d 881 (1986).

A state court is Constitutionally obligated to respect these principles of federal law because, "(t)he Supremacy Clause makes (federal) laws 'The supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 2438, 110 L.Ed.2d 332 (1990). The obligation placed upon States by the Supremacy Clause cannot be reduced to a mere matter of comity, as the Oklahoma Supreme Court held in *Hoover*. "The Constitution and laws of the United States are not a body of laws external to the States, acknowledged and enforced simply as a matter of comity" *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. ____, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997).

Respondent and its *amici* further argue² that state judicial power over tribes is created by selected quotes excised from this Court's opinions in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) ("State authority over Indians is yet more extensive over activities . . . not on any reservation") and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 36 L.Ed.2d 114 (1973) ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state").

²Resp. Br., p. 4; See also Brief *amicus curiae* of the State of Oklahoma in support of Respondent ("Resp. Okla. Br."), p. 9-10; Brief *amicus curiae* of states in support of Respondent ("Resp. States Br."), p. 11-12; Brief *amicus curiae* of First National Bank in Altus and Raymond L. Friedlob in Support of Respondent ("Resp. Bank Br."), p. 10-11.

Kake and *Mescalero* plainly recognize that certain designated Indian activities outside Indian Country may be subject to some degree of state regulation or taxation. *Mescalero* determined that a ski resort off of Indian country was subject to state taxation, in the absence of federal preemption. *Kake* subjected Indians fishing in state waters to state regulations on fishing. But, neither *Kake* nor *Mescalero* addressed tribal immunity to suit. The issue of tribal immunity to suit was not in either *Kake* or *Mescalero* because in both instances the suit was initiated by the tribe, itself. Thus, quotes excised from those opinions are not relevant to Kiowa's immunity to suit.

When dealing directly with the question of tribal immunity to suit, this Court consistently recognizes that Congress, in defining the nature of Indian tribes and controlling Indian commerce, has preserved tribal immunity to suit. *Citizen Band*, 111 S.Ct. at 910 ("... Congress has consistently reiterated its approval of the immunity doctrine.") This Court has been careful to distinguish a tribe's immunity to suit from other aspects of a tribe's sovereignty, or, from a tribe's immunity from state taxation or state regulation. In *Puyallup III*, this Court determined that the tribe, itself, was immune from suit when the State of Washington secured orders against the tribe in an attempt to regulate fishing both on and off reservation. The individual tribal members, who claimed fishing rights under a treaty, were treated differently. The Court explained, "the successful assertion of tribal immunity ... does not impair the authority of the state court to adjudicate the rights of individual defendants ..." *Puyallup III*, 97 S.Ct. at 2621.

Respondent does not cite *Puyallup*³ when it argues that tribal immunity does not apply to actions outside Indian Country. But, plainly, *Puyallup III* applied tribal immunity, even with respect to the fishing outside Indian Country.

This Court again distinguished tribal immunity to suit from other aspects of tribal sovereignty in *Citizen Band*, 111 S.Ct. at 905. There, it applied Oklahoma's cigarette tax to Indian Country sales to non-tribal members. This Court explained that tribal sovereign immunity "does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes." *Id.* 111 S.Ct. at 911. But, when Oklahoma asked the Court to grant a money judgment against the tribe for uncollected past taxes, this Court refused to do so. It stated that it was "not disposed to modify the long-established principle of tribal sovereign immunity." *Id.* 111 S.Ct. at 910.

As *amicus*, the State of Oklahoma suggests that tribal immunity to suit applies only if the underlying tribal activity took place within Indian Country.⁴ It cites *Citizen Band* and emphasizes that the cigarette sales at issue in that case were all within Indian Country. This analysis ignores the fact that *Citizen Band* addressed two aspects of tribal sovereignty --

³*Amici* First National Bank in Altus and Raymond L. Friedlob reference *Puyallup III* as a case limited solely to fishing on reservation. (Resp. Bank Br., p. 11-2) The facts of the case, as recited in the opinion, show that the state court judgment at issue related to fishing both on and off reservation. *Puyallup III*, 97 S.Ct. 2619.

⁴Resp. Okla. Br., p. 12. *Amici* States make a similar suggestion (Resp. States Br., p. 13) as does *amicus* First National Bank in Altus and Raymond L. Friedlob (Resp. Bank Br., p. 12).

the tribe's amenability to state cigarette taxes and the tribe's amenability to unconsented suit. The *Citizen Band* opinion draws no geographical line regarding tribal immunity to suit. When it upholds tribal immunity to suit, *Citizen Band* refers to long established law that recognizes tribal immunity to suit. It also emphasizes that Congress, although it has the power to modify tribal immunity to suit, has consistently approved the doctrine. Finally, *Citizen Band* points out that immunity to suit is a part of Congress' pursuit of its "overriding goal" of encouraging tribal self-sufficiency and economic development. To the extent that *Citizen Band* placed any emphasis upon geography, it was to recognize that Oklahoma could not tax Indian Country cigarette sales to tribal members, but might tax such sales to non-tribal members.

Admittedly, *Citizen Band* recognized a right to charge cigarette taxes. But, it denied the right to go to the courts for a money judgment. As to enforcement, this Court plainly referred the State to alternatives other than money judgments against tribes. Those alternatives include agreements with tribes, or, asking Congress for appropriate legislation. With respect to a private litigant, the obvious alternative is to secure a waiver of immunity from the tribe. In this case, Respondent did not obtain a waiver, but, instead, accepted an express reservation of sovereign rights.

Irrespective of what Respondent and its *amici* try to draw from *Graham*, from phrases excised from *Kake* and *Mescalero*, or from interpretations of *Citizen Band*, this Court's holdings on tribal immunity to suit are direct, clear and easily understood. This Court has repeatedly held that a court has no jurisdiction over an Indian tribe unless either

Congress or the tribe create that jurisdiction with a consent to suit. *U.S.F. & G.*, 60 S.Ct. at 657. Any waiver of this immunity must be clearly and unequivocally expressed. *Santa Clara*, 98 S.Ct. at 1677. This is consistent with the delegation of power over Indian commerce to Congress, it recognizes that tribal sovereignty is subordinate only to the federal government, *Confederated Tribes of Colville Indian Reservation*, 100 S.Ct. at 2081, and it preserves tribal immunity from diminution by the states. *Three Affiliated Tribes of Fort Berthold Reservation*, 106 S.Ct. at 2313.

III.

A WAIVER MAY NOT BE IMPLIED FROM THE FACT THAT A TRIBE LEAVES TRIBAL LANDS.

Respondent proposes that this Court may imply a waiver of tribal immunity to suit from the fact that Kiowa engaged in commerce outside tribal lands.⁵ This suggestion plainly contradicts the principle that waivers of immunity may not be implied, but must be unequivocally expressed. *Santa Clara*, 98 S.Ct. at 1677, citing *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) quoting *United States v. King*, 395 U.S. 1, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). Further, this proposition plainly invites this Court to abrogate tribal immunity to suit, even in the face of Congress' recent decision to retain tribal immunity to suit. This Court has previously displayed a "proper respect" for the "plenary authority of Congress" in

⁵Resp. Br. at p. 10.

matters involving tribal sovereignty. *Santa Clara*, 98 S.Ct. at 1678. Congress' obvious intent to retain tribal immunity to suit suggests that Respondent's invitation should be declined.

Respondent cites *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934); *United States v. Winstar Corp.*, 518 U.S. ___, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996); *Sinking-Fund Case*, 99 U.S. 700, 25 L.Ed. 496 (1878) and *New Jersey v. Yard*, 95 U.S. 104, 24 L.Ed. 352 (1877) in support of its judgment. None of the cases help Respondent's position on tribal immunity to suit. In *Lynch*, there was a specific consent to suit by the United States. *Lynch*, 54 S.Ct. at 844. *Winstar*, *Sinking-Fund* and *Yard* do not deal with a sovereign's immunity to suit, but, rather with whether a sovereign may limit the future functioning of its own sovereign powers.

Amici States argue that if an Indian tribe's commerce is off of Indian Country, nothing in federal law requires States to recognize tribal immunity to suit.⁶ Thus, *amici* States propose that each State must be free to define tribal immunity to suit, in the same way that each State was left free to define the immunity of other States by this Court's opinion in *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

Both this Court and Congress plainly recognize tribal immunity to suit. See e.g., *Santa Clara*, 98 S.Ct. at 1677 ("Indian tribes have long been recognized as possessing the

⁶Resp. States Br. at p. 4.

common-law immunity from suit traditionally enjoyed by sovereign powers"). This Court has deemed tribal sovereign immunity to be "a necessary corollary to Indian sovereignty and self-government." *Three Affiliated Tribes of Ft. Berthold Reservation*, 106 S.Ct. at 2313; see also 25 U.S.C. § 3746 ("nothing in this chapter shall be construed to affect, modify, diminish or otherwise impair the sovereign immunity from suit enjoyed by Indian tribes.") Thus, federal recognition of tribal immunity to suit is beyond any serious questioning.

In that federal law plainly recognizes tribal immunity to suit, *amici* States must key their argument upon the thought that federal recognition of tribal immunity to suit is not binding upon States. *Amici* States suggest that States are independent sovereigns that recognize the immunity of another sovereign only because of an agreement with that sovereign, or, as a matter of comity, relying upon *Hall*, 99 S.Ct. at 1186.

Amici's proposal requires an extensive re-casting of the basic relationship among tribes, States and the Federal Government. *Amici's* proposals plainly envision that tribes, States and the Federal Government be treated as three completely independent and unrelated sovereigns. In our federal system, this is not the case.

While States do, indeed, retain various aspects of sovereignty, they delegated the power over Indian commerce to Congress. Art. I, sec. 8, cl. 3, United States Constitution. This delegation is so complete that states have been divested of virtually all authority over Indian commerce and Indian tribes. *Seminole Tribe of Fla.*, 116 S.Ct. at

1126. With respect to Indian commerce, states are not the independent sovereigns discussed in *Hall*.

Indian tribes are entities so unique that comparison to either states or foreign governments risks serious mischaracterization of the nature of tribes. Tribes are sovereigns, but of a unique and limited nature. They retain some of the inherent powers of self-governing political communities that were formed long before Europeans first settled North America. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). Today, tribal sovereignty exists only at the sufferance of Congress and is subject to complete defeasance by Congress. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978). Because of the States' delegation of power to Congress, tribal sovereignty is dependent on and subordinate to, only the Federal Government, not the States. *Confederated Tribes of Colville Indian Reservation*, 100 S.Ct. at 2081. Tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States. *Three Affiliated Tribes of Fort Berthold Reservation*, 106 S.Ct. at 2313. Thus, tribes look only to Congress for a definition of their nature, powers and even their existence. They certainly are not the independent sovereigns discussed in *Hall*.

Congress, in the exercise of its delegated power, has formulated a national policy for Indian commerce and affairs. Congress' goal is to promote Indian self-government with an "overriding goal" of encouraging tribal self-sufficiency and economic development. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987); 25 U.S.C. § 450(b). In

pursuit of these goals, Congress recognizes a trust responsibility to tribal governments that includes the protection of the sovereignty of each tribal government. 25 U.S.C. § 3601(2). This sovereignty which Congress protects includes tribal immunity to suit, which Congress has explicitly protected on two occasions. 25 U.S.C. § 450(n) and 25 U.S.C. § 3746. If Congress is to exercise its delegated powers with a comprehensive national policy, then Congress must be the source of the articulation of any State powers -- not the States themselves. Thus, as to Indian commerce, it is necessary to recognize the supremacy of the Federal Government.

Because of the States' delegation of power over Indian commerce to Congress and because Congress is actively pursuing an articulated policy in the delegated area, States have no basis to claim powers that otherwise would belong to an independent sovereign. As to matters which concern Indian commerce, the Supremacy Clause is more significant than the *Hall* idea that States are free to define their own independent positions.

IV.

POLICY CONSIDERATIONS SHOULD BE DIRECTED TO CONGRESS.

Amici States advance various policy arguments to support Oklahoma's novel position on tribal immunity to suit.⁷ What *amici* promote with these policy considerations is not reform of immunity -- a step that many of *amici* States

⁷Resp. States Br., p. 16-19; Resp. Okla. Br., p. 13-17.

have taken for themselves by legislation -- but, rather, a complete elimination of immunity -- a step that none of *amici* States have taken for themselves. In fact, Florida was only recently before this Court urging its own sovereign immunity to suit. *Seminole Tribe of Fla.*, 116 S.Ct. at 1121. Doubtlessly, *amici* States understand the importance of immunity and the importance of having any reform of immunity come through carefully considered legislation. Because legislation is the proper method to achieve a reform of tribal immunity to suit, *amici's* policy consideration are best directed to Congress. In a legislative forum, the States' concerns can be weighed against those of both the tribes and the United States.

CONCLUSION

For these reasons, and for the reasons stated in the Petitioner's Brief, the judgment must be reversed with instructions that the suit be dismissed. Without a waiver of tribal immunity, Oklahoma courts have no jurisdiction.

Respectfully submitted,

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No. 96-1037

In the Supreme Court of the United StatesOCTOBER TERM, 1996

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGIES, INC.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF APPEALS

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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39PP

QUESTION PRESENTED

Whether the sovereign immunity from suit accorded to Indian Tribes as a matter of federal law bars an action brought in state court to recover money damages for a breach of contract arising out of commercial activity undertaken by a Tribe outside Indian country.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1037

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGIES, INC.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF APPEALS

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

The United States' interest in this case arises primarily from the national government's special relationship with the Indian Tribes. Continued recognition of tribal sovereign immunity from suit is an important part of the protection that federal law affords to tribal sovereignty, and it furthers Congress's policy of encouraging tribal self-determination and economic development. The United States also has an interest in ensuring the observance of federal supremacy in all matters relating to the Tribes. At the Court's invitation, the Acting Solicitor General filed a brief in this case at the petition stage expressing the views of the United States.

STATEMENT

1. The United States entered into its first treaty with the Kiowa Nation of Indians in 1837. 7 Stat. 533. Later treaties with the Kiowa were concluded in 1853 (10 Stat. 1013), 1865 (14 Stat. 717), and 1867 (15 Stat. 581, 589). Those treaties effectively recognized the Kiowa as a "domestic dependent nation" and established a relationship of trust and protection between the Tribe and the United States. See generally *Cherokee Nation v. Georgia*, 30 U.S. (15 Pet.) 1, 17 (1831). The United States continues to recognize the tribal government, now formally organized under the Oklahoma Indian Welfare Act, 25 U.S.C. 503, as having "the immunities and privileges available to * * * federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 61 Fed. Reg. 58,211, 58,213 (1996) (quoting 25 C.F.R. 83.2); see also 25 U.S.C. 479a, 479a-1.¹

In their 1867 treaties, 15 Stat. 581, 589, the Kiowa, Comanche and Apache Tribes retained, from their original tribal lands, well over 2,000,000 acres as a permanent reservation. See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (describing history). Through later shifts in law and policy, however, the United States divested the Kiowa of the majority of the reserved lands, in exchange for allotments of land to individual members of the Tribe and cash compensation to be held in trust for the Tribe by the United States. *Ibid.* We are informed that the Tribe today retains some 1,200 acres of land in Oklahoma, much of it in scattered parcels, as well as an interest in approximately

¹ We are informed that the Tribe presently has approximately 11,000 enrolled members, of whom a smaller number are actively involved in tribal affairs.

3,000 acres of land held by the United States in trust for the Kiowa, Comanche and Apache Tribes.

2. The record in this case is sparse. It appears that a tribal entity entered into a letter agreement dated March 19, 1990, in which it agreed to purchase stock then held by respondent in an Oklahoma corporation known as Clinton-Sherman Aviation, Inc. (CSA). See Pet. App. 2; J.A. 9, 49-50. On April 3, 1990, the then-Chairman of the Tribe's Business Committee signed, in the name of the Tribe, a short-term promissory note (the Note) promising to pay respondent \$285,000, with interest at an annual rate of 10% in the ordinary course and 15% after any default. J.A. 11-14, 67, 77-78.

The face of the Note indicates that it was signed at Carnegie, Oklahoma, where the Tribe maintains a Tribal Complex on land held in trust for the Tribe by the United States. J.A. 11, 14; see J.A. 16. Respondent's petition seeking enforcement of the Note alleges (J.A. 10), however, that the Note was "executed and delivered to [respondent] in Oklahoma City," and petitioner has not contested that allegation. Unless otherwise directed, payments were to be made at respondent's offices in Oklahoma City. J.A. 11. The Note fails to specify a governing law, but in a paragraph entitled "Waivers and Governing Law" it provides: "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." J.A. 14.

The Note called for only two payments, to be made 30 and 90 days after the Note was signed. J.A. 11. The Tribe did not make either payment. J.A. 78. It further appears, from the decision in a related case, that a similar financial undertaking given by the Tribe in connection with the acquisition of additional shares of CSA was secured by the acquired shares, which subsequently proved to be worthless. Pet. App. 3; *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 60 & n.3 (Okla. 1995), cert. denied, 116

S. Ct. 1675 (1996); see also *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 360 & n.1 (Okla. 1996) (default on promissory note assumed in related transaction).

3. Three years after payment was due, respondent sued the Tribe in state court seeking judgment on the Note. Pet. App. 2; J.A. 1 (petition filed Aug. 24, 1993). The Tribe moved to dismiss for lack of jurisdiction, in part on the ground that the Tribe had never waived its sovereign immunity from suit, and therefore could not be sued for money damages. See Pet. App. 2; J.A. 15. The court denied that motion (J.A. 48), and the Tribe answered, again asserting its immunity from suit (J.A. 50). The court granted respondent's motion for summary judgment, awarding respondent a total of \$445,471 in principal and accrued interest, together with attorneys' fees and costs. J.A. 77-79.

The Oklahoma Court of Appeals affirmed (Pet. App. 1-4), and the Oklahoma Supreme Court declined discretionary review (see Pet. 2). The court of appeals rejected the Tribe's sovereign immunity argument in this case on the authority of *Hoover v. Kiowa Tribe of Oklahoma*, which arose out of the same transaction and involved essentially the same facts. In *Hoover*, the Oklahoma Supreme Court referred to its earlier decision in *Lewis v. Sac & Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503 (1994), cert. denied, 116 S. Ct. 476 (1995), which held (*id.* at 507-512) that the Oklahoma courts are generally empowered to decide civil cases arising within their territorial jurisdiction, whether those cases are governed by federal or state law. Although *Lewis* recognized that a special jurisdictional inquiry was appropriate "whenever Indian interests are tendered in a controversy," it held that "[o]nly that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-

government stands outside the boundaries of permissible state-court cognizance." *Id.* at 508.

Lewis did not address the question of sovereign immunity. 896 P.2d at 506 n.15, 511 & n.59; *Hoover*, 909 P.2d at 61. In ruling on that issue, *Hoover* cited approvingly the New Mexico Supreme Court's decision in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (1988), cert. denied, 490 U.S. 1029 (1989), which held that a New Mexico court could decide a claim brought against a Tribe by a private party alleging a breach of contract in connection with off-reservation commercial activity undertaken by the Tribe. *Hoover* adopted *Padilla's* reasoning that a forum State's decision to recognize a Tribe's sovereign immunity from suit on claims arising within the state courts' usual territorial and subject-matter jurisdiction was no different from the forum State's decision to accord another State immunity from claims arising out of activities undertaken within the forum State. *Hoover*, 909 P.2d at 62; see *Padilla*, 754 P.2d at 850-851. Citing this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), *Padilla* held (754 P.2d at 850) that the decision was "solely a matter of comity." Because Oklahoma, like New Mexico, allows its courts to entertain suits against itself for breach of contract, *Hoover* concluded (909 P.2d at 62) that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." Despite an acknowledged conflict with the Tenth Circuit's decision in *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, cert. denied, 116 S. Ct. 57 (1995), the Oklahoma Supreme Court has subsequently reaffirmed *Hoover's* holding in *First National Bank in Altus v. Kiowa, Comanche & Apache Intertribal Land Use Committee*, 913 P.2d 299, 301 (1996); *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (1996); and *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*,

939 P.2d 1143, 1145-1148 (1997) (also upholding a judgment creditor's right to use against a Tribe the remedies ordinarily available in state court, including seizure of tribal tax revenues), petition for cert. pending, No. 97-216 (filed July 30, 1997).

SUMMARY OF ARGUMENT

The Oklahoma courts have asserted jurisdiction to hear and determine a suit for money damages brought directly against a federally recognized Indian Tribe. In the absence of consent by the Tribe or authorization by Congress, federal law forbids that exercise of state judicial power.

The Indian Tribes are a continuation of self-governing political communities whose original sovereignty predates that of the States. The question of who should represent this Nation in dealing with the Tribes was finally resolved by the adoption of the Constitution, which committed the field of Indian relations exclusively to the national government. The ensuing 200 years of negotiation, armed conflict, territorial consolidation, and successive federal policies have shaped for the Tribes a unique place in the Nation's political and legal history, as separate sovereigns under the dominant sovereignty and protection of the United States. The same history teaches that, while tribal sovereignty predates the Constitution, it is now federal law that both protects that sovereignty and defines its limits.

As this Court has long recognized and recently reaffirmed, sovereign immunity bars any suit against a Tribe for money damages in the absence of the Tribe's consent or congressional abrogation of the Tribe's immunity. The Court's cases make clear that a Tribe's immunity extends to suits based on tribal dealings with nonmembers, and to suits based on conduct that occurred outside Indian country. Because the Constitution vests

power over Indian affairs in the national government, and because both the States and the Tribes are therefore subject to a comprehensive body of federal law regulating those affairs, the States are not free to choose, as a matter of sovereign comity, whether or not to honor the tribal immunity recognized by this Court's cases. The scope afforded that immunity is a matter of supervening federal law.

Finally, even if the Oklahoma courts (or this Court) were free to resolve the question of tribal immunity as a matter of policy, this case suggests no persuasive reason to depart from the traditional rule. A sovereign's immunity from suit for money damages neither leaves potential commercial counterparties unable to protect their interests, nor interferes with the sovereign's ability to manage its commercial affairs. The rule of immunity does, however, at least partially protect the public represented by a sovereign—including the members of an Indian Tribe—from liability for the negligence, malfeasance, or naivete of its agents. The few facts disclosed by the record in this case are consistent with those general policy observations; and we see no reason to assume that recognition of petitioner's sovereign immunity from suit will cause unfairness to respondent, rather than preventing an equivalent unfairness to the Tribe.

ARGUMENT

THE TRIBAL SOVEREIGN IMMUNITY RECOGNIZED BY FEDERAL LAW PRECLUDES ANY SUIT AGAINST AN INDIAN TRIBE IN THE ABSENCE OF CONSENT BY THE TRIBE OR AUTHORIZATION BY CONGRESS

In rejecting petitioner's sovereign immunity defense to this action, the Oklahoma Court of Appeals relied on the Oklahoma Supreme Court's decisions in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 62 (1995), cert. denied, 116

S. Ct. 1675 (1996), and *First National Bank in Altus v. Kiowa, Comanche & Apache Intertribal Land Use Committee*, 913 P.2d 299, 300 (1996). Those decisions did not question that Indian Tribes are entitled to sovereign immunity from suit in certain circumstances, but they held that tribal sovereign immunity does not bar a suit in state court to enforce "a contract between an Indian tribe and a non-Indian * * * when the contract is executed outside of Indian Country." *Hoover*, 909 P.2d at 62. That conclusion is incorrect as a matter of federal law.

A. Indian Tribes Are Neither States Nor Foreign Nations, But "Domestic Dependent Nations"

The Indian Tribes of the United States are a direct continuation of "self-governing political communities that were formed long before Europeans first settled in North America." *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). Their original sovereign character therefore predates that of the original States, which themselves grew out of the separate "self-governing political communities" established by European settlers when they arrived on these shores. In their early relations, the European colonies, and their sponsoring governments, although they asserted "title" to the new continent as against all other Europeans by right of "discovery" (*Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-574 (1823)), nonetheless recognized the native communities that they encountered as independent powers—"formidable enemies, or effective friends." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 546 (1832); see *Johnson*, 21 U.S. at 590. Relations with the various Tribes were conducted by governments, and embodied in treaties. See, e.g., *Worcester*, 31 U.S. at 542-548; *Johnson*, 21 U.S. at 600-604; F. Cohen, *Handbook of Federal Indian Law* 46-47 (1942).

The advent of colonial independence "found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe." *Worcester*, 31 U.S. at 558. The practice of dealing with the Tribes as separate powers continued under the first government of the United States, but with considerable confusion of authority as between the national government and those of the individual States. Article IX of the Articles of Confederation conferred on Congress "the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians," but only with respect to those Indians who were "not members of any of the States," and further "provided that the legislative right of any State within its own limits be not infringed or violated."² Under the power that was granted, and the treaty power also granted to Congress by Article IX, the national government entered into treaties with several Tribes. See *Worcester*, 31 U.S. at 548-554; Cohen, *Handbook* 47-49.

The division of responsibility for Indian affairs between state and national governments under the Articles of Confederation proved, according to James Madison, a source of "frequent perplexity and contention in the federal councils":

[H]ow the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The Federalist No. 42, at 269 (Madison) (C. Rossiter ed., 1961). New York, for example, made separate treaties with

² Article VI also recognized the right of an individual State to take up arms if it "received certain advice of a resolution being formed by some nation of Indians to invade such State."

some Tribes (see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 231 (1985)); and "[t]he ambiguous phrases which follow[ed] the grant of power to the United States [in the Articles], were so construed by the states of North Carolina and Georgia as to annul the power itself," leading to "discontents and confusion" (*Worcester*, 31 U.S. at 559)). The question of state relations with the Indian Tribes was therefore much on the minds of delegates to the Constitutional Convention of 1787. It was resolved by ceding to the national government not only all power to make treaties (see Art. I, § 10; Art. II, § 2, Cl. 2), but also all power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Art. I, § 8, Cl. 3). See *Worcester*, 31 U.S. at 559; *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with the Indian tribes."); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974). Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida*, 470 U.S. at 234.

For some 80 years after the adoption of the Constitution, the United States continued to conduct relations with Indian Tribes through a combination of negotiated treaties and armed force. See generally, *e.g.*, Cohen, *Handbook* 49-66.³ In 1871 Congress, while affirming the continued validity of previous treaties, declared that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the

³ The last treaty negotiated with petitioner, in 1867, was designed in part to conclude peace with Tribes, including petitioner, that had joined the Sioux in hostilities against the United States. Cohen, *Handbook* 65.

United States may contract by treaty." Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566, codified at 25 U.S.C. 71. For years thereafter, the United States dealt with the Tribes by way of agreements that "differed from formal treaties only in that they were ratified by both houses of Congress instead of by the Senate alone." Cohen, *Handbook* 67. After a period during which national policy favored allotting tribal lands to individual Indians and making unallotted lands available for non-Indian settlement, with a view to the eventual termination of the reservation system, Congress ultimately adopted a new approach, and new statutes, designed to foster tribal economic and political self-determination, within the limits of full participation as a unique but integral part of the modern United States. See generally *id.* at 83-87, 206-217; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478-479 (1976); *Mancari*, 417 U.S. at 552-555.

This brief reminder of a long history suggests the underpinnings of a point made repeatedly in this Court's cases: Indian Tribes have a unique place in this Nation's history and, consequently, in its laws. See, *e.g.*, *National Farmers Union Ins. Co.*, 471 U.S. at 851; *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *Mancari*, 417 U.S. at 551-553; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *United States v. Kagama*, 118 U.S. 375, 381-382 (1886); *Ex parte Crow Dog*, 109 U.S. 556, 568-570 (1883). Self-governing societies in original enjoyment of large portions of this continent, the Tribes were, from the beginning of European settlement, commonly recognized as separate "states" or "nations" (see *Worcester*, 31 U.S. at 561; *Cherokee Nation*, 30 U.S. at 16). As the European colonies themselves grew into States and then into a Nation, however, they asserted first an exclusive right to deal with the Tribes, and ultimately a claim to complete territorial dominion over

what is now the United States. See generally *Kagama*, 118 U.S. at 381; *Johnson*, *supra*. By treaty where possible, by force of arms where it was thought necessary, the Tribes were brought under the dominant sovereignty of the new national government, so that what was plainly "Indian territory" was nonetheless also considered to lie "within the jurisdictional limits of the United States." *Cherokee Nation*, 30 U.S. at 17; see *Johnson*, 21 U.S. at 588 ("Conquest gives a title which the Courts of the conqueror cannot deny."). Because the Tribes "occup[ied] a territory to which we assert[ed] a title independent of their will," they could not be considered foreign nations—"not * * * because a tribe may not be a nation, but because it is not foreign to the United States." *Cherokee Nation*, 30 U.S. at 17, 19. Nor, however, was their original sovereignty destroyed by virtue of their coming under the dominant sovereignty and protection of the United States. See *Worcester*, 31 U.S. at 560-561. Instead they became, in Chief Justice Marshall's precisely descriptive phrase (*Cherokee Nation*, 30 U.S. at 17), "domestic dependent nations."

B. The Scope Of Tribal Sovereign Immunity Is Governed By Federal Law

In *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (1996), the Oklahoma Supreme Court characterized the issue of tribal sovereign immunity as "a state law question." That is incorrect.

As we have discussed, the Constitution granted the United States sole power to regulate relations with the Tribes, in conscious response to problems caused by the previous division of authority between the national government and the States. Neither the Tribes nor their members were represented at the Constitutional Convention: The Tribes ceded none of their sovereignty there,

and their people conferred none on the new government of the United States. See *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028, 2034 (1997); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991). The creation of a strong national government with exclusive responsibility for Indian relations did, however, directly affect the Tribes during the ensuing 150 years of this Nation's consolidation and expansion.

It was the United States—not any individual State—with which the Tribes negotiated; with which from time to time they fought; with which they concluded treaties of peace, friendship and protection; and the dominant sovereignty of which they were ultimately persuaded or constrained to accept. Because that dominant sovereignty is different in origin from the sovereignty exercised by the federal government with respect to the States, it is also different in kind and extent. All remaining rights of tribal sovereignty and self-government, unlike the similar rights enjoyed by the people of the States as such, are "ultimately dependent on and subject to the broad power of Congress." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980); see also *United States Fidelity & Guaranty Co.*, 309 U.S. at 512 ("It is as though the immunity which was [the Tribes'] as sovereigns passed to the United States for their benefit, as their tribal properties did.").

At the same time it was the United States, rather than any individual State, that assumed, by the assertion of ultimate sovereignty over the Tribes, concomitant responsibilities to them and to their members. This Court has long held that the Tribes' "relation to the United States resembles that of a ward to his guardian" (*Cherokee Nation*, 30 U.S. at 17)); and Congress has recently reiterated that "through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a

unique trust responsibility to protect and support Indian tribes and Indian people." Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(3), 110 Stat. 4017, to be codified at 25 U.S.C. 4101(3). Compare *Kagama*, 118 U.S. at 383-384 ("These Indian tribes are the wards of the nation. * * * They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies."); see also, *e.g.*, *Mancari*, 417 U.S. at 552; *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-568 (1903). The United States has, therefore, not only plenary power over the field of Indian affairs, but a special responsibility to the Tribes and their members.

Federal law did not create tribal sovereignty, which predates the Constitution. See, *e.g.*, *Wheeler*, 435 U.S. at 322-330; *id.* at 328 ("none of these [federal] laws created the Indians' power to govern themselves"). It was not judicial decisions that originated a doctrine of tribal sovereignty, which might then be subject to modification by the courts, state or federal, in light of the passage of time or changes in circumstance. Instead, the Court has consistently recognized that the Tribes' sovereignty stems directly from their aboriginal possession and occupancy, as self-governing political communities, of territory that has since been incorporated into the United States. See, *e.g.*, *id.* at 322-323; *Worcester*, 31 U.S. at 558-561. The Constitution carried forward that fundamental understanding of the sovereign status of the Tribes, and it presumes the continuation of that sovereignty. See *Wheeler*, *supra* (applying doctrine of "dual sovereignty" to permit successive federal and tribal prosecutions); compare *Coeur d'Alene*, 117 S. Ct. at 2033-2034 (the Eleventh Amendment reflects a "broader concept of [sovereign] immunity, implicit in the Constitution"); *Seminole Tribe v.*

Florida, 116 S. Ct. 1114, 1122 (1996) (same); *Blatchford*, 501 U.S. at 779. The sovereignty of Tribes is therefore no less a first principle than the sovereignty of the States, or of the United States; and although subject to the plenary authority of Congress, it is not subject to judicial defeasance.

With the adoption of the Constitution the Tribes became subject, as we have described, to the dominant sovereignty of the United States. But decisions involving the assertion of that dominance, in derogation of the Tribes' pre-existing sovereignty, rest with the political Branches of the national government. See, *e.g.*, *Lone Wolf*, 187 U.S. at 565, 568 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."). All questions concerning the extent and nature of tribal sovereignty are therefore questions of federal law; but the fundamental rule to be applied by the courts—state or federal—is that tribal sovereignty retains its full vitality except to the extent that it has been divested through the national political process. See *Wheeler*, 435 U.S. at 323; *Washington v. Confederated Tribes*, 447 U.S. 134, 153-154 (1980) (sovereignty may be divested where inconsistent with overriding national interests, but "it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"); compare *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

C. Federal Law Precludes A Suit For Money Damages Against An Unconsenting Tribe

In *Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), this

Court reaffirmed that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." That statement reflects longstanding precedent. See, e.g., *Coeur d'Alene*, 117 S. Ct. at 2034 ("the plan of the convention did not surrender Indian tribes' immunity for the benefit of the States"); *Blatchford*, 501 U.S. at 782 ("We have repeatedly held that Indian tribes enjoy immunity against suits by States."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 890-891 (1986) ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172-173 (1977); *United States Fidelity & Guaranty Co.*, 309 U.S. at 512-515; *Thebo v. Choctaw Tribe*, 66 F. 372, 374-376 (8th Cir. 1895). The Oklahoma Supreme Court's holding that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country" (*Hoover*, 909 P.2d at 62) is incompatible with that established principle of federal law.

1. Sovereign immunity bars suits based on a Tribe's dealings with nonmembers

Potawatomi makes clear that tribal sovereign immunity bars an action for monetary relief, even if the action is based on a Tribe's commercial dealings with nonmembers. In that case, Oklahoma sought to recover \$2.7 million from the Citizen Band Potawatomi Indian Tribe for taxes on cigarettes sold to nonmembers by a store owned and operated by the Tribe. See 498 U.S. at 507. This Court held that the Tribe was obligated to collect

state taxes on future cigarette sales to nonmembers, but that tribal sovereign immunity barred a money judgment against the Tribe for unpaid taxes on past sales. *Id.* at 509-511, 514.

The Court specifically refused Oklahoma's invitation "to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity." 498 U.S. at 510. The State argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense," and that the doctrine therefore "should be limited to the tribal courts and the internal affairs of tribal government." *Ibid.*⁴ In rejecting that argument, the Court observed that Congress "has always been at liberty to dispense with * * * tribal immunity or to limit it," and "has occasionally authorized limited classes of suits against Indian tribes," but that it "has never authorized suits to enforce tax assessments," and "has consistently reiterated its approval of the immunity doctrine." *Ibid.* The Court concluded that, although the State might have alternative methods of collecting the taxes at issue, there was "no doubt that sovereign immunity bar[red] the State from pursuing the most efficient remedy" by bringing suit directly against the Tribe. *Id.* at 514.

As the Court noted in *Potawatomi*, "Congress has consistently reiterated its approval of the immunity doctrine," which is consistent with "Congress' desire to promote the goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." 498 U.S. at 510 (internal quotation marks omitted), citing the Indian Financing Act

⁴ Compare *Hoover*, 909 P.2d at 62 ("Only that litigation which * * * infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance."); *Aircraft Equip. Co.*, 921 P.2d at 362 (discussing commercial context).

of 1974, 25 U.S.C. 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act (ISEAA), 25 U.S.C. 450 *et seq.*; see 25 U.S.C. 450n (nothing in ISEAA, which establishes a framework of financial assistance for Tribes, is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"). Moreover, while "Congress has occasionally authorized limited classes of suits against Indian tribes" (*Potawatomi*, 498 U.S. at 510), respondent has not alleged that any such provision is applicable to this case.⁵ The absence of any such authorization reinforces the conclusion that tribal governments remain protected by the established rule of sovereign immunity. While certain tribal entities specially chartered to engage in commercial activities may be subject to suit in some cases, the promissory note on which respondent sued was signed in the name of the Tribe itself, and it specifically reserved the Tribe's "sovereign rights." J.A. 14, 67-68.⁶

⁵ Compare 25 U.S.C. 450f(c)(3) (providing for limited waivers by insurers in the context, and to the extent, of federally mandated liability insurance); 25 U.S.C. 2710(d)(7)(A)(ii) (authorizing suits by States in federal court to enjoin certain gaming activity on tribal lands); *United States Fidelity & Guaranty Co.*, 309 U.S. at 509, 513 (special statutory authorization for cross-claims); *Green v. Menominee Tribe*, 233 U.S. 558 (1914) (special jurisdictional statute for adjudication of claims by Indian traders); *United States v. Gorham*, 165 U.S. 316 (1897) (discussing Indian Depredation Act of 1891); *Thebo*, 66 F. at 373-374 & n.1.

⁶ In the Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984, 25 U.S.C. 461 *et seq.*, Congress authorized most Tribes to adopt constitutions for the conduct of their governments (IRA § 16, 25 U.S.C. 476) and to receive separate charters of incorporation to enable them to engage in business activities through separate entities (IRA § 17, 25 U.S.C. 477). The principal reason for Section 17 of the IRA was a concern that non-Indian entities would not enter into commercial dealings with a tribal government because of its immunities. 65 Interior Dec.

Nothing that has occurred since the decision in *Potawatomi* calls its reasoning into question. To the contrary, in 1993 Congress enacted the Indian Tribal Justice Act, 25 U.S.C. 3601 *et seq.*, which again recognizes the "inherent sovereignty of Indian tribes" and confirms Congress's understanding that the United States has a "trust responsibility" that generally includes "the protection of the sovereignty of each tribal government." 25 U.S.C. 3601; see also 25 U.S.C. 479a note (congressional findings). Congress has recently considered, but to date has not enacted, proposals specifically designed to abrogate, or to require the waiver of, tribal sovereign immunity under certain circumstances. See, *e.g.*, S. Rep. No. 56, 105th Cong., 1st Sess. 63-64 (1997) (discussing Section 120 of the Department of the Interior and Related Agencies Appropriations Bill, 1998, H.R. 2107, as reported to the Senate, with amendments, by the Senate Committee

483, 484 (1958); R. Strickland et al., *Felix Cohen's Handbook of Federal Indian Law* 325-326 (1982) (1982 Cohen). The Oklahoma Indian Welfare Act (OIWA), ch. 831, § 3, 49 Stat. 1967 (1936), authorizes Oklahoma Tribes, such as petitioner, to adopt constitutions and to receive corporate charters equivalent to those issued under the IRA. 25 U.S.C. 503. Charters of incorporation issued under Section 17 of the IRA often contain a clause expressly allowing the corporation to sue or be sued. Similarly, the OIWA authorizes any ten or more individual Oklahoma Indians to form a cooperative association chartered by the Secretary of the Interior, and the Act expressly provides that such an association "may sue and be sued" in state or federal court. 25 U.S.C. 504, 505. Some courts have construed "sue or be sued" clauses in IRA charters to waive the immunity of the incorporated entity from suit. See, *e.g.*, *Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 671 (8th Cir. 1986). Any such waiver is limited, however, to the business dealings and assets of that corporation, and does not extend to the Tribe in its sovereign capacity. 1982 Cohen at 325-326; see, *e.g.*, *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 715 n.9 (10th Cir. 1989); *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 320 (10th Cir. 1982).

on Appropriations); *Tribal Sovereign Immunity: Hearing Before the Senate Comm. on Indian Affairs*, 104th Cong., 2d Sess. (1996). Congress is the appropriate forum for the consideration and disposition of such proposals, because it has both the constitutional authority and the institutional competence, as a deliberative national legislative and policy-making body, to consider and reconcile the rights and interests of States, Tribes, and individual citizens.⁷

2. Sovereign immunity bars suits against a Tribe based on conduct that occurred outside Indian country

The rule of sovereign immunity is not rendered inapplicable in this case simply because the contract at issue was evidently negotiated, and the relevant documents were allegedly signed, within the State's territorial jurisdiction and not on land held by or for the Tribe or its members. Compare *Hoover*, 909 P.2d at 62 (Tribe may be sued on contract "executed outside of Indian Country"). This Court has previously refused to draw just such a distinction. In *Puyallup Tribe, Inc. v. Department of Game*, a Tribe challenged a state court's judgment that asserted

⁷ Practical and policy considerations have led many sovereigns, including the United States, to waive their immunity from suit under some circumstances. See, e.g., page 27, *infra*; 28 U.S.C. 1346, 1491, 2674. On the other hand, Congress's consistent support for tribal immunity has been predicated in part on its "desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Potawatomi*, 498 U.S. at 510 (internal quotation marks omitted). Those goals could be seriously compromised—and the federal fisc additionally burdened—by exposing Tribes to the burdens of litigation and the enforcement of money judgments against tribal treasuries, including the seizure of tribal tax revenues. See *Aircraft Equip. Co.*, *supra*. Only Congress is in a position to reconcile such legitimate but conflicting policy concerns.

"jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation." 433 U.S. at 167. This Court held that a claim of sovereign immunity was "well founded" to the extent that it was "advanced on behalf of the Tribe, rather than the individual [Indian] defendants." *Id.* at 167-168; see *id.* at 172-173. Accordingly, the Court held that "the portions of the state-court order that involve[d] relief against the Tribe itself must be vacated in order to honor the Tribe's valid claim of immunity." *Id.* at 173. In reaching that conclusion, the Court did not distinguish the Tribe's activities on reservation land from those occurring elsewhere, observing simply that "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Id.* at 172.

The Oklahoma Supreme Court relied on cases such as *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). See *Hoover*, 909 P.2d at 61 (quoting *Mescalero* and *Kake*); *Aircraft Equip. Co.*, 921 P.2d at 361-362 & n.2 (same). Those cases hold that a State may have authority to tax or regulate the activities of Tribes or individual Indians who engage in conduct (such as operating a ski resort, as in *Mescalero*, or fishing, as in *Kake*) within the State but outside Indian country. As *Potawatomi* makes clear (see 498 U.S. at 512-514), however, there is a difference between the right to demand compliance with state law and the means that may be available to enforce such compliance. In that respect an immune Tribe is no different from a State, which may be subject to certain legal obligations, yet not subject to a suit directly against the State to enforce them; or a foreign sovereign, which has no "right" to engage in commercial activity within a State without complying with that State's valid regulations, but which nonetheless may be sued by a private party for violating

those regulations only if and as permitted by federal law. See, e.g., *id.* at 514; *Ex parte Young*, 209 U.S. 123 (1907); *In re Ayers*, 123 U.S. 443, 506-507 (1887); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 486-489, 493.⁸ Neither *Mescalero* nor *Kake* discusses enforcement, or mentions tribal immunity from suit.⁹ This Court's later decisions in *Potawatomi* and *Puyallup* do address those issues, and they hold that neither a valid state tax nor a valid state fishing regulation may be enforced in a suit brought directly against an affected Tribe.

3. State recognition of tribal sovereign immunity is not a matter of comity under state law

In rejecting the sovereign immunity defense advanced in *Hoover*, the Oklahoma Supreme Court relied in part

⁸ Similarly, it is important to note that the issue of a Tribe's sovereign immunity from suit is quite different from the issue of a Tribe's or State's general regulatory or adjudicatory jurisdiction, which, like that of any sovereign, is more closely tied to considerations of citizenship and territory. Compare, e.g., *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409-1410, 1413-1416 (1997). The Oklahoma Supreme Court appears to have confused the two concepts, applying to tribal immunity (which is absolute in the absence of explicit tribal or congressional consent) a facts-and-circumstances test that seems to be taken from the general jurisdictional context. Compare *Hoover*, 909 P.2d at 61, citing *Lewis v. Sac & Fox Tribe of Oklahoma Housing Authority*, 896 P.2d 503, 508 (Okla. 1994) ("Only that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance."), cert. denied, 116 S. Ct. 476 (1995), with *Strate*, 117 S. Ct. at 1416 ("Neither regulatory nor adjudicatory authority over the state highway accident at issue is needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'").

⁹ We also note that in both *Mescalero* (see 411 U.S. at 146-147) and *Kake* (see 369 U.S. at 62) it was a Tribe itself that had brought suit, thus submitting to the jurisdiction of the court to decide the question presented. Compare *Three Affiliated Tribes*, 476 U.S. at 891.

on this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), for the proposition that a Tribe's sovereign immunity from suit in state court, like the immunity of a sister State, could be decided by the state courts "solely [as] a matter of comity." *Hoover*, 909 P.2d at 61-62, quoting *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989). That analogy between States and Tribes is a false one.

Hall sustained the California courts' exercise of jurisdiction over the State of Nevada, based on tortious conduct by a Nevada agent within California. The Court noted that, in the absence of other federal law, any restriction on California's judicial power to entertain the claim at issue would have to be found in the federal Constitution. See 440 U.S. at 414 & n.5; see also *id.* at 430 (Blackmun, J., dissenting). The Court observed, however, that "the question whether one State might be subject to suit in the courts of another State was apparently not a matter of concern when the new Constitution was being drafted and ratified." *Id.* at 418-419. Finding no evidence that the Constitution was intended to strip the States of their preexisting sovereign prerogative to exercise (or to refrain from exercising) their "exclusive territorial jurisdiction over visiting sovereigns" (*id.* at 417; see *id.* at 416-418 & n.13), the Court held that the Constitution generally leaves each State free to decide, as a matter of policy and comity, whether and on what terms to accord its sister States immunity from suit in its own courts. *Id.* at 418-427.

Hall is inapposite here. While the framers of the Constitution may not have adverted to the possibility of suits against one State in the courts of another (see *Hall*, 440 U.S. at 418-419), they were, as we have explained (see pages 9-10, *supra*), specifically concerned about the question of relations between the States and the Indian

Tribes. The Constitution addressed that question by vesting the power over Indian affairs—like the analogous power over foreign relations—exclusively in the new national government. *Hall* rests on the premise that the Constitution embodies only certain mutual concessions concerning the States' otherwise sovereign relations among themselves; but one of those concessions was each State's renunciation, in favor of the new national government, of any power to carry on independent sovereign relations with the Indian Tribes.¹⁰ Thus, as we have described (see pages 12-15, *supra*), the question of tribal sovereignty is governed by a comprehensive body of federal law that binds both petitioner and the State of Oklahoma. A State is not free to decide whether or not it will respect a Tribe's immunity, because the degree of comity due the Tribes is a matter of national, not state, policy; and the policymakers are Congress and the President, not the state (or federal) courts.

Indeed, with respect to tribal sovereign immunity from suit in state court, a more appropriate analogy than the immunity of a sister State is the immunity of a foreign Nation. See *Coeur d'Alene*, 117 S. Ct. at 2034 (with respect to the States' sovereign immunity from suit, "Indian tribes * * * should be accorded the same status as foreign sovereigns"). That question, too, for similar constitutional and structural reasons, is one of federal law, to be determined by the political Branches in the exercise of their plenary power over foreign affairs. *Verlinden*, 461 U.S. at 486. For many years, under the rule of "grace and

¹⁰ Thus, while Article I, Section 8, Clause 3 of the Constitution grants Congress the power to regulate commerce "among the several States," in the same breath it confers the power to regulate the entire Nation's commerce both "with foreign Nations" and "with the Indian Tribes." Cf. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 153-154 & n.19 (1982).

comity" that traditionally applied among national sovereigns, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Ibid.*; see also *Hall*, 440 U.S. at 416-417. Beginning in 1952, the Executive Branch adopted a more restrictive view of foreign sovereign immunity, generally permitting the exercise of jurisdiction in suits arising out of a foreign sovereign's purely commercial activities. That position of the Executive was then binding upon the courts under the principle that "[i]t is * * * not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). In 1976, Congress largely codified that approach in the Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.* Significantly, however, the courts did not take it upon themselves to abrogate the sovereign immunity of foreign governments in particular circumstances. That step was left to the political Branches, as the Constitution required.

In the exercise of the plenary power over Indian affairs similarly committed to it by the Constitution, the national government could, if it chose, render Tribes like petitioner amenable to suit in state court on commercial contracts signed outside the Tribe's own territorial jurisdiction. Congress has not adopted any such policy, however, and in the absence of such a national political decision, the courts of the States may not invoke their own notions of comity as a justification for asserting jurisdiction over Tribes in derogation of the rule of tribal sovereign immunity recognized by federal law. Cf. *Three Affiliated Tribes*, 476 U.S. at 892-893; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-427 (1964).

D. Policy Considerations Support The Continued Recognition Of Tribal Sovereign Immunity In Cases Involving Commercial Contracts

The Oklahoma Supreme Court identified "important public policy considerations" that it believed supported its jurisdictional reasoning. *Aircraft Equip. Co.*, 921 P.2d at 362. Noting that "[c]ontracts are effective when parties know that the provisions of the contract will be enforced," the court observed that enforcement "protects all of our citizens including the tribes who voluntarily choose to do business with their fellow Oklahoma citizens." *Ibid.* In the court's view, "the tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations." *Ibid.* Thus, the court concluded, to honor the Tribe's immunity from suit would "chill tribal commercial and entrepreneurial business." *Ibid.*

As we have explained, the question whether the policy considerations identified by the Oklahoma Supreme Court warrant a revision of the present rule of tribal immunity is one for Congress, not the courts of the several States. Even if the Oklahoma courts were free to vary the existing federal immunity rule in exceptional circumstances, however, nothing in the present case could justify such a step. The existence of sovereign immunity does mean that commercial contracts with a sovereign—whether a State, the United States, an Indian Tribe, or a foreign government—may be subject to rules different from those that apply to contracts with private parties. See, e.g., *In re Ayers*, 123 U.S. at 505 (a contract with a State "is substantially without sanction, except that which arises out of the honor and good faith of the State itself, and these are not subject to coercion"); compare *Three Affiliated Tribes*, 476 U.S. at 893. There is, however, nothing unworkable or unfair about the resulting regime.

A sovereign's immunity from suit for money damages does not leave a potential commercial counterparty unable to protect its interests. A seller or buyer of goods or services may, for example, require that the sovereign pay or deliver in advance, or it may raise its prices or lower its bid to compensate for the increased risk of non-performance. It may insist on escrow, letter-of-credit, or other security arrangements to ensure that a transaction will not be completed until the sovereign has performed its obligations. Or it may simply refuse to deal with a sovereign that will not consent to suit, if it deems the likely gain not worth the risk or inconvenience (as it might, for example, if the sovereign had developed a reputation for failing to honor its obligations).

It is true, as the *Aircraft Equipment* court observed, that the need for such measures may make it more difficult for a tribal sovereign to find willing commercial counterparties, or may, at any rate, increase the Tribe's costs. That is a familiar problem for sovereigns, and there are equally familiar solutions. A sovereign may, for example, establish special commercial entities that are, like private corporations, liable to suit, but only to the extent of their own capital or other resources. See, e.g., note 6, *supra*. It may consent to suits against it in its own courts, in all cases or with whatever conditions and exceptions it deems desirable. See, e.g., 28 U.S.C. 1346, 1491, 2674; *Hoover*, 909 P.2d at 62 (Oklahoma permits suits against itself for breach of contract); Navajo Nat. Code Tit. 1, § 554 (1995); *id.* Tit. 5, § 1567. Or it may consent, in general or with respect to a particular transaction, to waive its immunity and submit to the jurisdiction of another sovereign.¹¹ We may assume that, in the absence

¹¹ See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982). We are informed that it is not unusual for tribal contracts reviewed by the Department of the Interior

of congressional provision to the contrary or other special circumstances, all these measures are available to Indian Tribes, as they are to other sovereigns.

The existence of tribal sovereign immunity, then, neither interferes with the Tribe's management of its commercial affairs nor imposes any unfair burden on those who transact business with the Tribe.¹² On the other hand, the doctrine does prevent the imposition of monetary liabilities that the Tribe itself has not clearly agreed to bear. As with other sovereigns, therefore, the doctrine at least partially protects the Tribe as sovereign—which is to say, the tribal public, whose collective interest the sovereign represents—from unconsented liability for the negligence, malfeasance, or simple naivete of its agents. See *United States Fidelity & Guaranty Co.*, 309 U.S. at 513 (“It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials.”). Moreover, while the basic rule of tribal immunity may, in the absence of some contrary provision of federal law, be modified through clear, specific, and properly authorized waivers, if the Tribe finds that course necessary or appropriate, the converse is not true: In the absence of the basic rule, the Tribe would have no adequate means to protect itself under circumstances in which it would not advisedly

to contain specific, limited waiver provisions. Because immunity is such an important attribute of sovereignty, the courts have always scrutinized alleged waivers closely. To be effective, a waiver must be properly authorized by the sovereign itself, not merely by an agent; it must be clear and unequivocal; and its scope will be strictly construed in favor of the sovereign. See, e.g., *Lane v. Peña*, 116 S. Ct. 2092, 2096–2097 (1996); *Santa Clara Pueblo*, 436 U.S. at 58–59; *United States Fidelity & Guaranty Co.*, 309 U.S. at 513.

¹² Of course, the doctrine has no impact at all on commercial dealings with individual members of a Tribe.

have consented to liability. Thus, while the recognition of tribal sovereign immunity is a matter of mandatory federal law, not open to modification by the courts on policy grounds, the relevant policy considerations would support the same result.

These general principles comport with what the record below, and the decisions in related cases, reveal about the transaction at issue in this case. A tribal entity agreed to pay respondent \$285,000 for stock in Clinton-Sherman Aviation, Inc. (CSA). See page 3, *supra*. In the same transaction, the Tribe agreed to pay Robert Hoover \$142,500 for additional shares of CSA. *Hoover*, 909 P.2d at 60. And, in a related transaction, the Tribe agreed to assume a \$180,000 debt in order to acquire the assets of Aircraft Equipment Company—although there seems to have been at least some question as to whether that purchase was properly authorized by the Tribe. See *Aircraft Equip. Co.*, 921 P.2d at 360 & n.1.

So far as appears, each of the Tribe's counterparties in these transactions was a commercially sophisticated, Oklahoma-based business or individual, presumably aware of the rule of tribal sovereign immunity. Respondent in this case could not have been unaware of that rule, because the “Waivers and Governing Law” section of the otherwise conventional Promissory Note specifically provides that “[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.” J.A. 14. The record in this case does not indicate whether the Tribe's obligation on the Note was secured by the purchased shares; but the Note had a term of only 90 days, and the note at issue in *Hoover*, which was signed as part of the same transaction, was secured by CSA shares, on which Hoover foreclosed when the Tribe failed to make payment. 909 P.2d at 60 & n.3.

It is impossible, on the present record, to draw any firm conclusion about the actual business agreement that underlies this case. We review the few known facts only to suggest that there is no basis for concluding that recognition of the Tribe's sovereign immunity will be at all unjust to respondent. A no-cash transaction, with the seller's recourse explicitly limited to repossession of the property sold (rather than a suit for the full stated purchase price), would, for example, be an efficient way to arrange the sale of an asset of highly uncertain value, the seller thereby retaining some or all of the risk of overvaluation during the period in which the buyer agrees to make payment. If that was the business agreement here, then respondent, understanding the Tribe's immunity from money damages, bargained only for the retention or repossession of its shares in the event of non-payment. Any cash recovery on the Note would, on that assumption, represent an unnegotiated windfall to respondent. Particularly given the likely relative commercial sophistication of the parties, and the fact that, by the time of the foreclosure sale in *Hoover*, the shares of CSA were worthless (see 909 P.2d at 60 n.3), we see no reason to assume that proper recognition of petitioner's sovereign immunity from suit will cause unfairness to respondent, rather than preventing an equivalent unfairness to the Tribe.

CONCLUSION

The judgment of the Oklahoma Court of Appeals should be reversed.

Respectfully submitted.

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In The
Supreme Court of the United States
October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.
an Oklahoma corporation,

Respondent.

On Writ Of Certiorari To The
Court Of Appeals, Division I,
For The State Of Oklahoma

BRIEF AMICI CURIAE OF THE CHOCTAW
NATION OF OKLAHOMA AND THE
CHICKASAW NATION IN SUPPORT OF PETITIONER

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BRIEF AMICI CURIAE OF THE CHOCTAW NATION OF OKLAHOMA AND THE CHICKASAW NATION IN SUPPORT OF PETITIONER

The Choctaw Nation of Oklahoma and the Chickasaw Nation respectfully submit this brief *Amicus Curiae* in support of petitioner, The Kiowa Tribe of Oklahoma, in this case. Written consent to the filing of this brief has been obtained from all parties. The original letters authorizing this filing have been filed concurrently herewith.

INTEREST OF AMICI¹

The Choctaw Nation of Oklahoma and the Chickasaw Nation are two of the larger federally recognized Indian tribes in the country. Prior to the allotment process at the turn of this century the area over which they governed covered most of southern Oklahoma. They continue to occupy and exercise tribal jurisdiction over thousands of acres within those historical boundaries.

Amici have an interest in this case because, under existing federal law, states have no authority to subject Indian tribes to coercive state court jurisdiction. Notwithstanding this longstanding prohibition, the Oklahoma Supreme Court has ignored settled federal law in several cases to carve out an unprecedented exception to tribal sovereign immunity. On July 9, 1997, the Chickasaw Nation was sued in the District Court of Tulsa County, Oklahoma in a case in which the plaintiff oil company

¹ Pursuant to Supreme Court Rule 37.6, Amici discloses that counsel for amici authored this brief in whole. No other person or entity, other than Amici, its members or its counsel, made a monetary contribution to the preparation or submission of this brief.

alleges it (oil company) "accepted" a contract in Tulsa County (off Chickasaw Nation Indian Country) to provide services and goods on Chickasaw lands and will surely rely on the Oklahoma court's misplaced decisions for jurisdictional purposes. Amici desire to be protected from this and future coercive state court jurisdiction against them and their economic enterprises.

Both tribes are heavily involved in economic activity where revenue is generated to fund needed governmental services to tribal members. These tribes have made significant strides in their federally encouraged goal of economic self-sufficiency and self-determination. For example, the Choctaw Nation has gaming establishments; manufacturing plants which provide defense materials to the U.S. Government and other products to the private sector; several truck stops and smoke shops which sell motor fuel and tobacco products which are taxed through compacts with the state. The Chickasaw Nation is also engaged in similar commercial activities. Subjecting Indian tribes to involuntary state court jurisdiction will place federal and tribal goals at serious risk.

Amici tribes file this brief to urge this Court to correct the confusion created by Oklahoma State Court decisions and to uphold the Court's unbroken and long line of decisions which hold, without exception, that states may not exercise jurisdiction over Indian tribes absent an express unequivocal waiver of immunity by the Tribe or an act of Congress.

SUMMARY OF ARGUMENT

Tribal sovereign immunity from unconsented suit is a fundamental element of federal Indian law from which this Court has never departed. In fact, the Court has consistently stated that this aspect of sovereignty can never be diminished without the consent of Congress or the Tribe.

Tribal immunity from suit is consistent with and essential to the federal government's policy of self-determination and economic development for Indian tribes. Such policies and tribal sovereign rights are governed entirely by federal law and may not be diminished by the States. Recent decisions of the Oklahoma Courts, such as the case at bar, present a threat to tribal sovereignty and infringe on tribal self-governance.

The States may not ignore the decisions of the federal courts on issues that are purely federal and governed by federal law. This decision, and others, of the Oklahoma Courts contravenes a long-standing and well-established policy enunciated many times by this Court and strictly adhered to by the lower federal courts. It should be reversed.

In conclusion, Amici will suggest there is a simple and valid solution to the concerns of the state court relating to business dealings with Indian tribes. Prior to engaging in a business transaction with the Tribe, the non-Indian party can require a valid waiver of immunity from suit. If the tribe declines, the other party should avoid dealing with it.

ARGUMENT

I. UNQUALIFIED TRIBAL SOVEREIGN IMMUNITY FROM UNCONSENTED SUIT IS A BASIC PRINCIPLE OF FEDERAL INDIAN LAW

An elementary doctrine of federal Indian law is that an Indian tribe may not be sued in any court absent its express, unequivocal waiver of sovereign immunity or specific authorization by Congress. *Turner v. United States*, 248 U.S. 354, 358 (1919) ("Without authorization from Congress, the [Creek] Nation could not be sued in any court; at least without its consent"); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) ("These Indian Nations [Choctaw and Chickasaw] are exempt from suit without congressional authorization"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986) ("... in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states").

The most recent occasion this Court addressed this issue is in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) where the Court reaffirmed that "[s]uits against Indian tribes are * * * barred by sovereign immunity absent a clear waiver by the Tribe or congressional abrogation". The

Court rejected the petitioner's proposal that it "modify the long-established principal of tribal immunity." (*Id.* at 511) The Court's refusal to modify came notwithstanding the fact " . . . sovereign immunity bar[red] the State from pursuing the most efficient remedy . . . " to collect taxes lawfully due it. (*Id.* at 514).

Citizen Band makes it clear that the Oklahoma Courts are misguided when they refuse to recognize sovereign immunity on the grounds that the Tribe was engaged in commercial activities with non-Indians.² *Puyallup* also stands for the proposition that tribal sovereign immunity applies to a tribe's commercial activities off of its Indian country. There, the Court reversed a judgment finding " . . . that the (state) court had jurisdiction to regulate the fishing activities of the tribe both on and off its reservation". (433 U.S. at 167) (Emphasis supplied)

II. PLENARY AND UNENCUMBERED CONGRESSIONAL CONTROL OVER TRIBAL IMMUNITY FROM SUIT IS ESSENTIAL TO THE FULFILLMENT OF THE CONGRESSIONAL TRUST RESPONSIBILITY

A "trust" responsibility between the federal political branches and the tribes has existed for over a century and a half. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); see also, e.g., *United States v. Mitchell*, 463 U.S. 206, 224-28 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The trust responsibility, *inter alia*,

² There the Oklahoma Tax Commission was attempting to collect taxes on commercial sales to non-tribal members.

"define[s] the required standard of conduct for federal officials and Congress . . . ", and "is one of the primary cornerstones of Indian law". F. Cohen, *Handbook of Federal Indian Law* (1982 ed. at 220-21)

As a preliminary matter, it must be noted that pursuant to its trust responsibility, Congress has taken the field of tribal immunity from unconsented suit completely in hand. It has aptly and continuously demonstrated that it knows how to abrogate tribal immunity when it wants to. See, e.g., Act of June 28, 1898, ch. 517, § 2, 30 Stat. 495 (held to be a *limited* abrogation of tribal immunity in *Fidelity & Guaranty*, 309 U.S. at 513); Pub. L. No. 93-195, § 2, 87 Stat. 769 (1973) (*limited* abrogation of tribal immunity, applied in *Choctaw Nation v. Cherokee Nation*, 393 F.Supp. 224, 226-27 (E.D. Okla. 1975)). At the same time, its activities in the tribal immunity context have made it equally clear that, pursuant to its trust responsibility, it would abrogate such immunities only with great selectivity and care. *Thebo v. Choctaw Tribe*, 66 F. 372, 373-4 (8th Cir. 1895); Indian Self-Determination and Education Assistance Act. Pub. L. No. 93-638, tit. I, § 110, 88 Stat. 2213 (1975) (expressly preserving tribal immunity); Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, § 203, 82 Stat. 73, 78 (codified at 25 U.S.C. § 1303) (permitting *habeas corpus* relief against tribe, but not constituting a general abrogation of tribal immunity from suit, see *Santa Clara Pueblo*, 436 U.S. at 59); H.R. 13329, 95th Cong., 2d Sess. (1978) (proposal for wholesale diminution of tribal sovereignty, rejected by Congress). Congress, indeed, takes its trust responsibilities seriously in the area of tribal immunity from suit.

In the context of the trust responsibility, a number of legal consequences flow from the preceding facts. First, as the Oklahoma Court long ago recognized, the federal plenary power over Indian affairs is "[f]ull; entire; complete; absolute; perfect; unqualified." *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okla. 1942). More particularly, federal statutes in the tribal immunity field, as was the case in the timber management field in *Mitchell*, "clearly give the Federal Government full responsibility" in the area. Cf. *Mitchell*, 463 U.S. at 224. As then-Judge Anthony Kennedy has written, "Indian tribes enjoy immunity because they are sovereigns predating the constitution, and immunity is thought necessary to preserve autonomous tribal existence." *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981) (emphasis added) (citations omitted). If tribal immunity is to be diminished, it is for Congress, in the exercise of its trust responsibility, to make and effectuate that judgment.

Long ago, this Court, after a "careful review" of prior decisions, *United States v. Sandoval*, 231 U.S. 28, 46 (1913), stated:

"Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long-established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests for the Indian require his release from [the guardianship]. (Emphasis supplied)

Tiger v. Western Investment Co., 221 U.S. 286, 315 (1911). See generally *Haile v. Saunooke*, 246 F.2d 293, 297-98 (4th Cir. 1957) (citing case law between *Tiger* and 1957).

Contemporary case law in this Court has supported without deviation (on the merits) amicus' contention that deviations from the tribal immunity rule are for Congress, not the courts, to make. *Santa Clara Pueblo*, 436 U.S. at 58. Such a conclusion, premises considered, is essential to the ability of Congress to fulfill its trust responsibilities, unencumbered by inconsistent judicial applications. As will be noted in the immediately following section, both the federal executive branch and the Congress have, in recent years, vigorously promoted tribal self-governance, autonomy, and self-determination; such federal policies could easily be thwarted by attempted "runs on the tribal treasury" should the correlative, reinforcing, and equally vital congressional policy supporting tribal immunity (except as expressly³ diminished by federal statute) be given short shrift by the state courts.

³ A further consequence of the trust is that "courts presume that congress' intent toward [Indian tribes] is benevolent and have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, *supra* p. 7 at 221. Thus, federal abrogations of tribal immunity cannot be implied, but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58.

III. WITH RARE EXCEPTIONS NOT RELEVANT HEREIN, CONTEMPORARY CONGRESSIONAL AND EXECUTIVE POLICIES CONTINUE TO FAVOR BOTH TRIBAL SELF-DETERMINATION AND TRIBAL IMMUNITY FROM UNCONSENTED SUIT

"The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. And Congress in recent years has expressed a "jealous regard for Indian self-governance." *Id.* See also, e.g. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 & nn. 19-20 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 & n.17 (1983); Arrow, *Contemporary Tensions in Constitutional Indian Law*, 12 Okla. City U.L. Rev. 469, 474 n. 27 (1987).

The Executive Branch has been equally supportive. From the strong support provided tribal immunity in *Fidelity & Guaranty*, see Brief for the United States at 20-23, *Fidelity & Guaranty*, 309 U.S. 506 (No. 39-569), to the continued support provided to that doctrine in UNITED STATES DEPARTMENT OF INTERIOR, FEDERAL INDIAN LAW 492-94 (1958) (even though that "revision" of Felix Cohen's 1942 Handbook occurred during an "assimilationist" Indian policy era), the tribal immunity doctrine has not been questioned in that branch. More recently, Presidents Nixon, see 116 Cong. Rec. 23,258-62 (1970) and Reagan, see 19 Weekly Comp. Pres. Doc. 96-100 (Jan. 24, 1983), have strongly supported tribal autonomy, self-governance, and self-determination.

The federal government, of course, has not slavishly supported either tribal sovereignty, or, more particularly,

tribal immunity from suit during the last few decades. In the Indian Civil Rights Act of 1968, as has been noted, it authorized *habeas corpus* relief against Indian tribes (carefully balanced, it may be noted, by a tribal consent requirement for the future extension of state Public Law 230 jurisdiction, *see* 25 U.S.C. §§ 1323(b), 1326 (1982)), and it abrogated the tribal immunity of the Cherokee, Chickasaw, and Choctaw Nations in 1973 for the limited purpose of permitting the ascertainment of certain of those Tribes' rights *inter se*. Pub. L. No. 93-195, § 2, 87 Stat. 769 (1973). But those decisions – and the delicate judgments and balancing of the interests involved therein – are for the Congress, not the courts to make. *Amici* therefore respectfully submits that this Court should affirm its long-standing policy in adhering to the principle leaving issue-by-issue adjustments to the political branches, more particularly to the Congress, in the tribal immunity arena.

IV. FEDERAL INDIAN POLICY IS GOVERNED BY FEDERAL LAW AND MUST BE ADHERED TO BY THE STATE COURTS

State courts may not ignore or distort congressional policy and decisions of this Court on matters of federal law. However, against a virtual tidal wave of federal decisions and many from other state jurisdictions, Oklahoma's state courts have purported to carve out exceptions to the otherwise unqualified doctrine of tribal sovereign immunity based on whether the tribal activity occurred off Indian country and was commercial in nature.

The Oklahoma Supreme Court's unique revolution began in 1985 with *State, ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okl. 1985) where the Court ordered a state trial court to assume jurisdiction in a case in which the state sought to enjoin tribal bingo gaming on tribal lands.⁴ The Tenth Circuit Court subsequently enjoined the lower state court in Oklahoma from applying or enforcing the Oklahoma Supreme Court's flawed analysis. *Seneca-Cayuga Tribe v. State, ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989).

The Oklahoma Court remained somewhat passive in this area of Indian law for about ten years. However, the Court again embarked on its efforts to unilaterally redefine and narrow the doctrine in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okl. 1995), Cert. denied ___ U.S. ___, 116 S.Ct. 1675, 134 L.Ed.2d. Relying on a lone decision by the New Mexico Supreme Court, *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), Cert. denied 490 U.S. 1029, and misapplying decisions of this Court which had nothing to do with the application of tribal sovereign immunity from unconsented suit, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989); *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Nevada v. Hall*, 440 U.S. 410 (1979), the Court said that "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country". (*Id.* at 62)

⁴ The decision reversed the district court's finding that tribal immunity from suit deprived it of subject matter jurisdiction.

Three months later, the Court in *First National Bank in Altus v. Kiowa*, 913 P.2d 299 (Okl. 1996) declared *Hoover* to be dispositive on the bank's right to sue the tribe on a promissory note in state court. As noted in the dissent, the Court ignored a recent decision of the Tenth Circuit, *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1064 (10th Cir. 1995) which held that the doctrine of tribal immunity from unconsented suit in state court applies even if it "... results from commercial activity occurring off the Nation's reservation".

In *Aircraft Equipment v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (Okl. 1996) the Oklahoma Court, to emphasize its determination to whittle away at sovereign immunity, cited *Hanson* in a case having the same issue, but opined "... that a federal court's pronouncement on a state law question lacks the force of authority in that it cannot bind this Court". (Emphasis supplied) Apparently, the dissenters becoming increasingly alarmed, warned that the "... majority opinion contravenes the mainstream of contemporary sovereign immunity jurisprudence" and found it "... regrettable that this Court chips away at the long established sovereignty of the tribes". (J. Summers, 921 P.2d at 362-363)

With this trilogy of misguided decisions by Oklahoma's highest court, the Court of Appeals obviously felt that, in the instant case, it had no choice but to follow them, saying "[A]s the law now exists in Oklahoma, there appears no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding". (Pg. 4, Ct. of Appeals Opinion, App. to Pet. for Cert.)

Precisely because the Constitution has entrusted the federal government with exclusive authority to regulate relations with Indian tribes, the Oklahoma Supreme Court was prohibited under the Supremacy Clause of the Constitution, Article VI, Clause 2, from ignoring and rejecting the binding precedent established by the Tenth Circuit Court of Appeals in *Hanson*. *Rose v. Arkansas State Police*, 479 U.S. 1, 3 (1986); *Howlett By and Through Howlett v. Rose*, 496 U.S. 367 (1990)⁵ Federal Courts, and not state courts, are the final arbiters on the scope of federal laws and federal rights. *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Likewise, the Supremacy Clause requires state court judges – even those of a state supreme court – to determine and apply federal law when deciding a federal question. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law"); *Heck v. Humphrey*, 512 U.S. 477 114 S.Ct. 2364, 2373, n.9 (1994) ("State Courts are bound to apply federal rules in determining the preclusive effect of federal court decisions on issues of federal law").

The Alaska Supreme Court in *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977) enunciated the rule in a manner that befits this case:

⁵ The Supremacy Clause provides that "[t]his Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding."

"The Supremacy of the decisions of the Supreme Court of the United States has been recognized since *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 4 L.Ed. 97 1816. Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case.

There is no doubt that the Oklahoma Court has it wrong when it says in *Aircraft Equipment* that this is a "state law question". The law is absolutely clear that the scope of tribal sovereign immunity is exclusively a matter of federal law. (Tribal immunity from suit " . . . is subject plenary federal control and definition"). (*Wold Engineering* at 891) (" . . . Tribal immunity . . . governed by federal law". *Graham* at 841) *supra*.

CONCLUSION

The Oklahoma Supreme Court has impermissibly embarked on a mission to redefine and supplant an important and long-standing federal policy for Indian tribes with that of the State of Oklahoma. In *Aircraft Equipment*, at 362, the Court unabashedly said it was applying state public policy to " . . . protect[s] all of our citizens including tribes who voluntarily choose to do business with their fellow Oklahoma citizens"⁶ Such a crushing blow to an essential aspect of tribal sovereignty

⁶ While perhaps not intended, this otherwise cavalier designation of the Tribes as "fellow citizens of Oklahoma" may be an insight into the State's misguided perspective as to tribal sovereignty.

is unnecessary and, indeed, overkill. Amici do not condone deliberate breach of valid contracts under the protection of immunity from suit. However, there is a simple method in avoidance of this for the non-Indian party, i.e. require a waiver of sovereign immunity clause in the contract. It is done everyday all over this country by persons and firms doing business with Indian tribes. The Amici tribes have several agreements and compacts with the State of Oklahoma and non-Indian business entities with limited waivers of immunity approved by their governing bodies. As a corollary, no prudent business interest would dare enter into a business venture or contract with a state government, the United States government, or that of a foreign country without first determining how it could enforce its contractual rights.

The Courts of Oklahoma have amply demonstrated that they will take license with federally conferred tribal rights. Unless this Court strikes down this effort to limit tribal immunity, this instance will only be the tip of the iceberg. Amici urges the Court to protect this important aspect of their sovereignty and overrule the Oklahoma Appellate Courts.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

On Writ Of Certiorari
To The Court Of Appeals, Division I,
For The State Of Oklahoma

BRIEF OF THE NAVAJO NATION, THE NAVAJO
NATION OIL AND GAS CO., INC., THE NAVAJO
AGRICULTURAL PRODUCTS INDUSTRY, AND THE
MISSISSIPPI BAND OF CHOCTAW INDIANS AS
AMICI CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF THE AMICI CURIAE¹

The Navajo Nation is a federally recognized Indian nation with 225,000 citizens and a territory of over 25,000 square miles in the southwestern United States. The Navajo Nation entered into two treaties with the United States under which the United States agreed to protect Navajo self-government and to promote the well-being of the Navajo people. The Navajo Nation established the Navajo Nation Oil and Gas Company (NOG) and the Navajo Agricultural Products Industry (NAPI) in order to provide needed revenues to the Navajo Nation and to alleviate the high unemployment and crushing poverty of the Navajo people. NAPI employs Navajo tribal members and others on lands outside formal reservation boundaries provided by Congress for the 110,630-acre Navajo Indian Irrigation Project. *See* Act of June 13, 1992, Pub. L. No. 87-482, 76 Stat. 96. In 1993, the Navajo Nation Council authorized the incorporation of NOG under the Navajo Nation Corporation Act, 5 Navajo Nation Code ("N.N.C.") §§ 3100-3186 (1995), as a wholly-owned instrumentality of the Nation.² All profits of NOG are

¹ Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk.

² In establishing NOG, the Navajo Nation Council responded directly to Congress' encouragement of the formation of vertically integrated energy ventures. *See* 25 U.S.C. § 3503 (1995).

required by Navajo law to be devoted exclusively to essential governmental services.

The Navajo Nation statutorily waived its sovereign immunity for certain purposes and has established means by which its sovereign immunity may be waived further. See Navajo Sovereign Immunity Act, 1 N.N.C. §§ 551-555 (1995); 5 N.N.C. § 1636 (1995) (authorizing NAPI to waive sovereign immunity). Generally, claims against the Navajo Nation must be filed in the Navajo Courts, but NOG is authorized to waive its immunity from suit in any court after 30 days' notice to the Council.

The Mississippi Band of Choctaw Indians is a federally recognized Indian tribe whose citizens live in the aboriginal Choctaw territory. Prior to 1979, the Tribe had no industrial development and an unemployment rate of 75%. Living conditions were deplorable. However, in the 1980s the Tribe began to pursue an aggressive business development strategy. Today, tribal unemployment is below 20% and per capita income has doubled. See Fergus M. Bordewich, "How to Succeed in Business: Follow the Choctaws' Lead," *Smithsonian Magazine* (March 1996). Tribal immunity of the Choctaw Tribe is covered in §§ 1-2-6, 1-5-1 and 1-5-5 of the Choctaw Tribal Code. The Tribe's sovereign immunity has not impeded tribal self-sufficiency or economic development but is, quite simply, an issue dealt with routinely in contract negotiations. The Tribe's growth is the result of a carefully formulated tribal strategy for balanced community and economic development, building on its reservation land base and operating under tribal, rather than state, regulatory and adjudicatory jurisdiction.

Amici curiae have established solid business relationships with people and entities who live or do business

outside Indian country. *Amici curiae* have relied on the prior decisions of this Court that hold that, although an Indian tribe may waive its sovereign immunity, only Congress, and not the States, may abrogate tribal sovereign immunity.³ Were the views of the Oklahoma Court of Appeals adopted here, the contractual expectations of *amici curiae* would be upset and tribal self-determination threatened. Indeed, if the approach of the Oklahoma courts in the Kiowa cases were upheld, the States could accomplish as a practical matter the goal of tribal termination that Congress has repeatedly repudiated.

SUMMARY OF ARGUMENT

Indian tribes are domestic, dependent nations. They are not foreign states, nor are they subordinate to the several States.

Under the Constitution, Congress has exclusive authority to regulate commerce with the Indian tribes. Only Congress may abrogate tribal sovereign immunity. Because of the general impoverishment and the lack of banks and other economic institutions in Indian country,⁴

³ There is no suggestion in this case that the Kiowa Tribe waived its immunity; rather, the record shows that the Kiowa expressly preserved its sovereign rights in the contract at issue. Thus, this brief deals only with abrogation of tribal sovereign immunity.

⁴ See President Reagan's 1983 Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98, 100 (1983) ("Tribes have had limited opportunities to invest in their own economies, because often there has been no established resource base for

practically all tribal transactions of any significance have some off-reservation component. Oklahoma's extra-constitutional abrogation of tribal sovereign immunity gravely threatens Congress' "goals of tribal self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987).

The court below ignored settled law and federal policy simply to provide relief to one of its corporate citizens, who deliberately entered into what turned out to be an improvident transaction. This Court, in essence, already rejected the views of the Oklahoma courts in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991). This Court should reverse.

ARGUMENT

I. ONLY CONGRESS MAY ABROGATE TRIBAL SOVEREIGN IMMUNITY.

Under the Constitution, Congress is delegated the power to "regulate commerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. The Constitution distinguishes Indian tribes from foreign states, but not "because a tribe may not be a nation, but because it is not foreign to the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.)

community investment and development. Many reservations lack a developed physical infrastructure, including utilities, transportation, and other public services.")

1, 19 (1831). Tribes are obviously not states,⁵ and the relationship between the tribes and states lacks the "mutuality of concession" that makes plausible an implicit surrender of either's sovereign immunity in the other's courts. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

"The states have traditionally been hostile to the tribes. . . ." Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1077 (1982). "Because of the local ill feeling, the people of the States where [the Indians] are found are often their deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). The tribes are under the protection of the United States and may "not be subjected to the laws of the State and the process of its courts." *Id.* (emphasis added). "[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980).

Indian tribes are sovereigns. *Blatchford*, 501 U.S. at 780. Tribal sovereign powers "are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty, which has never been extinguished.'" Felix S. Cohen's *Handbook of Federal Indian Law* 231 (R. Strickland et al. eds. 1982) (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (emphasis in original)). One component of that original sovereignty is the tribes' immunity from suit. See e.g.

⁵ See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

United States v. United States Fidelity & Guar. Co., 309 U.S. 506, 512-13 (1940).

Under the Constitution, Congress, not the Executive branch or the federal courts, exercises the United States' exclusive authority to regulate commerce with the Indians. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). ("Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). Thus, Congress – and only Congress – may abrogate an Indian tribe's sovereign immunity. E.g., *Turner v. United States*, 248 U.S. 354, 358 (1919).

This has been the law and the settled policy of the United States since the beginning of the Republic. See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-63 (1832) (per Marshall, C.J.); *id.* at 591-92 (analogizing exclusivity of federal power to regulate intercourse with Indian tribes with that respecting powers to coin money and to enter into treaties with foreign nations) (per M'Lean, J.). In *Thebo v. Choctaw Tribe*, 66 F. 372 (CCA 8 1895), the court affirmed the dismissal of an action against the Choctaw Tribe in federal court. The court observed that "no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case." *Id.* at 374. The court reasoned:

As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the

courts, and required to respond to all the demands which private parties chose to prefer against it.

Id. at 376.

Thebo was extended in *Adams v. Murphy*, 165 F. 304 (CCA 8 1908), which held that allowing an action for damages to be brought against the Creek Nation's Principal Chief would be "to destroy in practice the very exemption [tribal sovereign immunity] which at the outset is conceded as a legal right." *Id.* at 308. The court again observed that "the settled doctrine of the government from the beginning" has been to "exempt from civil suit" the Indian tribes. *Id.*

Justice Brandeis, writing for a unanimous Court in *Turner v. United States*, 248 U.S. 354 (1919), stated most plainly, "[w]ithout authorization from Congress, the [Creek] Nation could not then have been sued in any court; at least, without its consent." *Id.* at 358. In *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), the Court once again declared unambiguously: "[t]hese Indian nations are exempt from suit without congressional authorization." *Id.* at 512 (footnote omitted). "[T]he suability of . . . the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authorization." *Id.* at 514. *Fidelity & Guaranty* voided the judgment of a federal court insofar as it purported to "fix a credit against the Indian nations" even though complete relief was unavailable in any other forum. *Id.* at 512-13. *Thebo*, *Adams*, *Turner*, and *Fidelity & Guaranty* all arose in Oklahoma (or Indian Territory in what later became the State of Oklahoma).

Modern cases are in accord. In *Puyallup Tribe, Inc. v. Washington Dep't of Game*, 433 U.S. 165 (1977), the Court reviewed a state court judgment concerning the regulation of "fishing activities of the Tribe both on and off its reservation." *Id.* at 167 (emphasis added). Despite the off-reservation conduct, this Court reversed the judgment with respect to the tribe, upholding its sovereign immunity from suit. *Id.* at 172-73. One year later, the Court ruled in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), that the Indian Civil Rights Act could not be interpreted to authorize civil actions even for declaratory and injunctive relief, stating that "'without congressional authorization,' the 'Indian Nations are exempt from suit.'" *Id.* (quoting *Fidelity & Guaranty*, 309 U.S. at 512).

In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986), the Court held that a state could not condition the availability of its courts on tribal consent to suit in all civil actions brought against the tribes in state courts, because "those statutory conditions may be met only at an unacceptably high price to tribal sovereignty." *Id.* at 889. The Court explained that "tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the State." *Id.* at 891. Finally, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, this Court addressed essentially the same issue that is presented here:

At the very least, Oklahoma proposes that the Court modify *Fidelity & Guaranty*, because tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context. The sovereignty

doctrine, it maintains, should be limited to the tribal courts and the internal affairs of the tribal government, because no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws.

498 U.S. 505, 510 (1991). This Court rejected Oklahoma's position because, although "Congress has always been at liberty to dispose with such tribal immunity or to limit it . . . Congress has consistently reiterated its approval of the immunity doctrine." *Id.* Relying on *Fidelity & Guaranty*, the Court held that a tribe's sovereign immunity protected it from even the assertion of a compulsory counterclaim by a state agency. *Id.* at 509-10.

II. CONGRESS HAS NOT AUTHORIZED STATE COURTS TO ADJUDICATE CLAIMS BROUGHT AGAINST INDIAN NATIONS.

Congress was delegated the authority to "regulate Commerce with foreign Nations . . . and with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Congress has exercised this authority by statute. With respect to sovereign immunity, Congress has treated Indian tribes quite differently than foreign nations, preserving intact the tribes' sovereign immunity while abrogating that of foreign sovereigns which engage in extra-territorial commercial activities.

"Congress knows how to limit the sovereign immunity of others when it wants to." *In Re Greene*, 980 F.2d 590, 594 n.3 (9th Cir. 1992), cert. denied sub nom. *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994). In the Foreign Sovereign Immunity Act of 1976 ("FSIA"), Congress

exempted commercial activities of foreign states having a direct effect in the United States from the general conferral of immunity from state court process. See 28 U.S.C. § 1605. Congress has also abrogated tribal sovereign immunity in rare instances. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. at 71 (Congress provided federal court review only in habeas corpus proceedings under the Indian Civil Rights Act). "But, for obvious reasons, this power has been sparingly exercised." *Thebo v. Choctaw Tribe*, 66 F. at 375.⁶

In fact, as this Court observed in *Potawatomi*, "Congress has consistently reiterated its approval of the [tribal] immunity doctrine." 498 U.S. at 510. In 1934 Congress preserved "all powers vested in any Indian tribe . . . by existing law" in the Indian Reorganization Act ("IRA"), 25 U.S.C. § 476(e), and in 1936 Congress extended the policies of the IRA to Oklahoma tribes in the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §§ 501-509. Congress enacted the OIWA to "permit the Indians of Oklahoma to exercise substantially the same rights and privileges as those granted to Indians outside of Oklahoma by the [IRA]." H.R. Rep. No. 2408, 74th

⁶ In the Indian Reorganization Act of 1934, Congress authorized the creation of tribal corporations for the conduct of business activities. Notably, those tribal corporations were given the ability, but were not required, to include "sue or be sued" language in their corporate charters. Brian C. Lake, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 Colum. Bus. L. Rev. 87, 101 (1996). The option of establishing tribal corporations without "sue and be sued" clauses was extended by Congress to non-IRA tribes in 1990. See 25 U.S.C. § 478-1.

Cong., 2d Sess. (1936); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1443-46 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). As shown above, the doctrine of tribal sovereign immunity, in Oklahoma and elsewhere, was firmly established when the IRA and OIWA were enacted, and even foreign states enjoyed "absolute immunity" in United States courts for their extra-territorial commercial activities then. See *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926); Note, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 Colum. L. Rev. 1086, 1087 (1965). See also *Powers of Indian Tribes*, 55 Interior Dec. 14, 24 (1934) (citing *Turner v. United States*, 51 Ct. Cl. 125 (1916), aff'd, 248 U.S. 354 (1919)).⁷

Indeed, at about the same time as it passed the FSIA, Congress preserved fully the tribes' sovereign immunity from suit. In effectuating President Nixon's "self-determination without termination" policy,⁸ Congress passed the Indian Self-Determination and Education Assistance Act of 1975, which provided that "[n]othing in this Act shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity enjoyed by an Indian tribe. . . ." 25 U.S.C. § 450(n)(1).⁹

⁷ Plainly, Congress has not waived generally the sovereign immunity of the *United States* in state courts, in cases involving Indians or otherwise. See, e.g., *Minnesota v. United States*, 305 U.S. 382, 388-89 (1939).

⁸ Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564, 565.

⁹ The Indian Self-Determination and Education Assistance Act is but one of several recent statutes declaring Congress' commitment to Indian self-sufficiency and self-determination. 25 U.S.C. § 450a(b). See Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601(2) ("the United States has a trust responsibility

Congress has not seen fit to abrogate tribal sovereign immunity for tribal commercial activities that may have off-reservation connections. It clearly has the power to do so. "[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 60. This requirement of a clear statement from Congress honors the allocation of federal power in Article I, § 8 of the Constitution, with lasting structural and practical benefits. See Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 428 (1993).

III. THE DECISION OF THE COURT BELOW LACKS ANY SUBSTANTIAL SUPPORT.

The issue before the Court is whether State courts may abrogate tribal sovereign immunity on an *ad hoc* basis where Congress has affirmatively preserved intact that feature of tribal sovereignty. The court below held that it had that power.

The holding of the Oklahoma Court of Appeals is contrary to the great weight of authority. The decision below ultimately rests on *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989), a

to each tribal government that includes the protection of the sovereignty of each tribal government"); Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency and strong tribal government").

decision that even New Mexico courts are beginning to question. See *DeFeo v. Ski Apache Resort*, 904 P.2d 1065, 1067-68 (N.M. App.) (distinguishing *Padilla* and embracing the reasoning of *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir.), *cert. denied*, 116 S.Ct. 57 (1995)), *cert. denied*, 903 P.2d 844 (N.M. 1995).

Padilla held that "the exercise of [state court] jurisdiction over a sovereign Indian tribe for off-reservation conduct is solely a matter of comity." 754 P.2d at 850. It came to this startling conclusion in reliance on *Nevada v. Hall*, 440 U.S. 410 (1979), a case involving the assertion of sovereign immunity by one State in the courts of a sister State. *Hall* is inapposite, because

[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with . . . Indian tribes.

Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991). See also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (fundamental differences in the nature of tribal and state sovereignty make it "treacherous" to apply to tribes principles developed in cases involving states). *Padilla* has been roundly criticized by courts and commentators alike:

Padilla is flawed for the basic reason that the New Mexico Supreme Court erred by incorrectly applying *Nevada v. Hall* in the context of tribal immunity. The decision in *Nevada v. Hall* narrowly addresses the issue of sovereign immunity between the states and does not contain any language signalling an intent to extend its analysis to Indian tribes. The sovereign

immunity of states and tribes derives from different sources, and while large, financially secure states no longer require the protection of sovereign immunity, this immunity still remains a very important tool used by Indian tribes to protect their scarce resources.

Lake, *supra* n.6, at 108 (footnotes omitted); *In Re Greene*, 980 F.2d at 593-95.

Not one federal court that has addressed the issue before the Court has agreed with either the reasoning or the outcome of the court below. See *In Re Greene* (criticizing *Padilla* and upholding tribal sovereign immunity in off-reservation commercial context); *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063-65 (10th Cir.) (adopting reasoning of *Greene* and holding that "the extra-territorial nature of [the] transactions does not strip the [Sac & Fox] Nation of its right to assert sovereign immunity"), *cert. denied*, 116 S.Ct. 57 (1995); *Federico v. Capital Gaming Int'l Inc.*, 888 F. Supp. 354, 357 (D.R.I. 1995) (quoting *Hanson*); *Elliott v. Capital Int'l Bank & Trust, Ltd.*, 870 F. Supp. 733, 735 (E. D. Tex. 1994) (immunity upheld where tribal bank officer allegedly defrauded plaintiff outside Indian country), *aff'd*, 102 F.3d 549 (5th Cir. 1996). See also *Maryland Cas. Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521-22 (5th Cir.) ("The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. It is in such enterprises and transactions that the Indian tribes and the Indians need protection. The history of intercourse between the Indian tribes and Indians with whites demonstrates such

need. . . . To construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity, namely, the protection of the interests and property of the tribes and the individual Indians."), *cert. denied*, 385 U.S. 918 (1966); *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378-79 (8th Cir. 1985) (tribe's sovereign immunity not waived by virtue of engaging in business); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993) (declining to weigh several factors to infer a tribe's waiver of sovereign immunity).

No state court agrees with the court below, either, except perhaps the New Mexico courts. See *DeFeo*, 904 P.2d at 1067-68. The State courts recognize that congressional action is required if tribes are to be stripped of their sovereign immunity, even in the context of commercial disputes arising outside of Indian country. See *North Sea Prods., Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979) (*en banc*) (upholding tribal immunity against state court garnishment action in context of tribal commercial enterprise outside reservation boundaries); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290 (Minn. 1996) (upholding tribal immunity where tribe's commercial activity took place both within and outside Indian country), *petition for cert. filed*, 65 U.S.L.W. 3539 (U.S. Jan. 29, 1997) (No. 96-1215); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968) (upholding tribal immunity from suit for damages arising from accident at tribe's off-reservation

amusement park).¹⁰ See also *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 363 (Okla. 1996) (Summers, J., dissenting) (if the result of the Kiowa cases "were based on the desire to make business dealings with tribes more fair and equitable, such a remedy should and could be fashioned by the United States Congress, not this Court.").

Hoover v. Kiowa Tribe of Oklahoma, 909 P.2d 59 (Okla. 1995), cert. denied, 116 S.Ct. 1675 (1996), was the first case decided by the Oklahoma Supreme Court concerning tribal sovereign immunity in the commercial context.¹¹ *Hoover's* discussion of tribal sovereign immunity begins with quotations of isolated passages from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). *Hoover*, 909 P.2d at 61. Neither case concerns tribal sovereign immunity. *Jones* affirmed the imposition of state gross receipts taxes

¹⁰ Arizona courts typically honor the sovereign immunity of tribes and tribal corporations in the commercial context. See *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. App. 1983) (farming company immune); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971) (timber company immune). One case holding otherwise employed a test (the "subordinate economic organization" test) described as "an even worse option" than that used in *Padilla Lake*, supra n. 6, at 109, criticizing *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989).

¹¹ *Hoover* noted *Lewis v. Sac and Fox Tribe of Okla. Housing Auth.*, 896 P.2d 503 (Okla. 1994), cert. denied, 116 S.Ct. 476 (1995), but conceded that the tribal entity in *Lewis* had specifically abandoned its immunity-based challenge to state court jurisdiction. *Hoover*, 909 P.2d at 61 (citing *Lewis*, 896 P.2d at 511).

on a tribe's ski resort located wholly outside of reservation boundaries, but an act of Congress specifically authorized such taxes. 411 U.S. at 149-50. Moreover, later decisions of this Court make clear that, even if state law applies to a tribe, the states may not be able to sue the tribes directly – "the most efficient remedy" – to enforce state law. *Potawatomi*, 498 U.S. at 514.

Hoover ultimately relies on *Padilla* – a most slender reed, as shown above. Later Oklahoma cases offer a variety of additional justifications, set forth below, for departing from settled law.¹² None withstand scrutiny.

1. *Denial of Certiorari*. In *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996) ("*Aircraft Equip. I*"), the following passage appears. "We follow the jurisprudence of *Hoover* and *Lewis* because in both cases certiorari was denied by the Supreme Court of the United States." *Id.* at 361. The court failed to recognize that the denial of certiorari "imports no expression upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923).

2. *Professed Solicitude for the Indians*. *Aircraft Equip. I* also found "important public policy considerations" to support the Oklahoma decisions, to wit: if sovereign immunity were upheld, "the tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations. Such a rule would chill tribal commercial and

¹² One subsequent decision, *First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299 (Okla. 1996), engaged in no legal analysis and simply held that *Hoover* was dispositive. *Id.* at 301.

entrepreneurial business." 921 P.2d at 362. *Amici curiae* have experienced no such chilling effect. In an analogous setting, the Tenth Circuit has exposed this rationalization of *Aircraft Equip. I* for what it is.

The Bank next argues that commercial relations between Indian tribes and non-Indian banks will be chilled if the district court's dismissal [for failure to exhaust tribal remedies] is affirmed. This policy argument precisely misses the point of sovereign immunity, which is the power of self-determination. We decline the Bank's invitation to second-guess the wisdom of the Nation's business decisions under the guise of judicial review.

Bank of Oklahoma v. Muscogee (Creek) Nation, 972 F.2d 1166, 1169 (10th Cir. 1992); see also *Hanson*, 47 F.3d at 1064. Oklahoma's policy consideration is, at best, misguided paternalism. See Presidential Comm'n on Indian Reservation Economies, *Report and Recommendations to the President of the United States*, Part 2 at 31, 115, 121 (1984) (from a "private sector business perspective" sovereign immunity is considered a "problem which the teams discovered low on the list of priorities. . . . As noted above, the teams found the lack of good business plans, a shortage of entrepreneurs, and insufficient attention to cash flows to be of far more importance to banks and other investors than questions of collateral."). Indeed, as this Court has noted, "the perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances. . . . " *Three Affiliated Tribes*, 476 U.S. at 893. Tribes and persons

dealing with them have long been able to effect a valid waiver of tribal sovereign immunity when they so desire. See e.g. *McClendon v. United States*, 885 F.2d 627, 631-32 (9th Cir. 1989); *American Indian Agric. Credit Consortium Inc.*, 780 F.2d at 1378-79.

Disputes such as the instant one would literally destroy many small tribes. See *Report and Recommendations to the President of the United States*, Part 1 at 29 ("Approximately 35% of all Indian reservations and Alaskan villages have fewer than 100 resident members."). In the instant case, total state court judgments against the Kiowa Tribe are said to exceed \$1.5 million. Oklahoma process is being employed to seize Kiowa tax revenues and federal judgment funds. The warning of *Thebo* should be heeded: an Indian tribe, regardless of its possible wealth, "will soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it." 66 F. at 376.

3. *The "state law" basis.* The confusion of the Oklahoma courts is exemplified in the characterization of the issue of tribal sovereign immunity as a "state law question." *Aircraft Equip. I*, 921 P.2d at 361. To the contrary, such issues are most assuredly federal law issues. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (Tribal sovereign immunity "is subject to the superior and plenary control of Congress."); *Three Affiliated Tribes*, 476 U.S. at 891 ("[I]n the absence of federal authorization, tribal immunity . . . is privileged from diminution by the States."); see generally *County of Oneida, N.Y. v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

4. The "Unique History" of Oklahoma. In *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma, et al.*, No. 86,184, 1997 WL 222406 (Okla. May 6, 1997) ("Aircraft Equip. II"), the court added another justification for its decisions – the "unique history in regard to relations with Indian tribes within [Oklahoma's] boundaries;" *Aircraft Equip. II*, 1997 WL 222406, at *7 n.6, citing Oklahoma's Organic Act and the Curtis Act. Neither act supports distinguishing Oklahoma tribes from other tribes. The Indian disclaimer provisions of Oklahoma's Enabling Act are practically identical to those of the other western states. See *Tiger v. Western Inv. Co.*, 221 U.S. 286, 309 (1911) ("Since statehood, the status of Indian tribes in Oklahoma has been similar to that of tribes in other states."); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 175 & n. 4 (1973); *Adams v. Murphy*, 165 F. 304, 312 (CCA 8 1908) (Curtis Act not intended to abolish tribal sovereign immunity). See also *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446 (D.C. Cir. 1988) (OIWA impliedly repealed Curtis Act), cert. denied, 488 U.S. 1010 (1989).

CONCLUSION

Only Congress may abrogate tribal sovereign immunity under the Constitution. The Indian Commerce Clause divests the States "of virtually all authority over Indian commerce." *Seminole Tribe v. Florida*, 517 U.S. ___, 116 S.Ct. 1114, 1126 (1996) and *id.* at 1168 ("the States have no sovereignty in the regulation of commerce with the tribes") (Souter, J., dissenting). No act of Congress has divested the Kiowa Tribe of its sovereign immunity from the exercise of state court jurisdiction in commercial or

any other disputes. The decision below must therefore be reversed.

Respectfully submitted,

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In the
Supreme Court of the United States
October Term, 1997

KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS,
DIVISION I, FOR THE STATE OF OKLAHOMA

**BRIEF OF AMICUS CURIAE FOND DU LAC
BAND OF LAKE SUPERIOR CHIPPEWA
IN SUPPORT OF PETITIONER**

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**BRIEF OF *AMICUS CURIAE* FOND DU LAC
BAND OF LAKE SUPERIOR CHIPPEWA
IN SUPPORT OF PETITIONER**

INTEREST OF AMICUS *

The Fond du Lac Band of Lake Superior Chippewa is a federally recognized Indian tribe which occupies the Fond du Lac Reservation in northeastern Minnesota pursuant to the

* Pursuant to rule 37.6 of the Rules of this Court, counsel for amicus states that no counsel for any party authored this brief in whole or part, and that no person or entity other than amicus and its counsel made any monetary contribution to the preparation and submission of this brief.

Treaty of LaPointe, 10 Stat. 1109. The Fond du Lac Band administers a variety of programs for Band members and other Indians in the Band's service area, including the operation of educational, housing and health care facilities,¹ and also operates several businesses, including two gaming establishments,² a hotel, and a construction company. The Band operates a health clinic, a group home and a tribal college off of the Reservation. In addition, the Band maintains a comprehensive conservation and natural resource management program in connection with its exercise of hunting, fishing and gathering rights under the treaties of 1837³ and 1854,⁴ much of which is federally-funded. *Fond du Lac Band of Chippewa v. Carlson*, Civ. No. 5-92-159 (D. Minn. March 18, 1996), *appeal pending*, Nos. 97-1757 et al. (8th Cir. 1997).⁵ The

¹ The Band's educational program is funded by the United States pursuant to the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*, and the Tribally-Controlled Community College Act of 1978, 25 U.S.C. § 1801 *et seq.*; the Band's health care program is funded by the United States pursuant to the Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1601 *et seq.*; and the Band's housing program is funded pursuant to the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, 110 Stat. 4017, to be codified at 25 U.S.C. § 4101 *et seq.*

² One of the Band's casinos, the Fond-du-Luth Casino, is operated on tribal trust land in downtown Duluth, Minnesota (approximately 25 miles northeast of the original Reservation) pursuant to a Tribal-City accord between the Band and the City, under which the City receives 30 percent of the net revenues of the Casino.

³ Treaty of July 29, 1837, 7 Stat. 536.

⁴ Treaty of September 30, 1854, 10 Stat. 1109 (Treaty of LaPointe).

⁵ Under the 1837 and 1854 treaties, the Fond du Lac Band has reserved harvest rights over some 8 million acres of land, from east-central Minnesota to the Canadian border. The harvest activities of Band members are exempt from state law only to the extent to which the Band itself maintains an effective system of self-regulation, which naturally requires an extensive regulatory and enforcement presence in those off-

common purposes of these operations is to improve the quality of life for Band members and to promote the continuity and self-determination of the Band as a whole.

The Fond du Lac Band has an interest in this case because every government program and enterprise operated by the Band engages in contractual relations involving some degree of off-reservation performance. The Band routinely enters into contracts with a variety of off-reservation vendors, contractors and consultants in its day-to-day operations. The maintenance of tribal autonomy in the modern world -- which has been the essence of federal Indian policy for three decades -- necessitates such interaction. An erosion of the tribal sovereign immunity doctrine in this case would expose tribes to unlimited litigation in alien forums which would sap the tribal resources necessary to the fulfillment of that purpose. The Band accordingly files this brief to urge this Court to uphold its earlier decisions regarding the nature and scope of tribal sovereign immunity and to hold that the Oklahoma courts are federally preempted from finding an implicit waiver of tribal immunity under Oklahoma state law.

Both parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

The Oklahoma Court of Appeals has in this case erroneously resolved an issue of tribal sovereign immunity

reservation areas. *Fond du Lac Band v. Carlson*, slip op. at 25-29 (citing *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981); *Mille Lacs Band of Chippewa v. State of Minnesota*, 861 F. Supp. 784, 838-39 (D. Minn. 1994); *Lac Courte Oreilles Band of Indians v. Wisconsin*, 668 F. Supp. 1233, 1241-42 (D. Wis. 1987)).

under Oklahoma state law, and has further erred by holding that the sovereign immunity of the Kiowa Tribe does not bar state jurisdiction over a breach of contract action against the Tribe arising off of tribal territory. Issues involving tribal sovereign immunity are the exclusive province of federal law, and numerous precedents of this Court provide that tribal sovereign immunity cannot be waived by implication, but only through the express and unequivocal consent to suit by Congress or by the tribe itself.

The primary state precedent relied upon by the Oklahoma Court of Appeals in this matter, *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1675 (1996), has mistakenly applied the precedent of *Nevada v. Hall*, 440 U.S. 410 (1979) in arriving at the conclusion that state court accommodation of tribal sovereign immunity is a discretionary function of comity. *Nevada v. Hall* is inapposite to this matter because that decision involved an issue of sovereign immunity arising between two states. Tribes are not states, and unlike the issue of state immunity in *Nevada v. Hall*, there is a constitutional barrier to the resolution of tribal immunity issues under state law. Indeed, Oklahoma consented to exclusive federal authority over Indian affairs upon achieving statehood.

The precedents of this Court and of the lower federal courts support the application of the tribal immunity doctrine in off-reservation and contractual contexts. The decisions of this Court regarding tribal immunity have without exception focused on the sovereign status of the tribes and on the federal trust responsibility to preserve tribal assets rather than on the situs of the claim. In *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172-73 (1977), tribal immunity was recognized as a barrier to state jurisdiction over tribal fishing activities off-reservation, and in *Oklahoma Tax Commission*

v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509-11 (1991), this Court held that tribal immunity bars an action for monetary damages against a tribe. The courts of at least five federal circuits have accordingly recognized tribal sovereign immunity as a jurisdictional barrier in contractual and off-reservation contexts.

As a policy matter, the federal objectives of promoting tribal self-determination and economic development would be seriously hampered by a restriction of the availability of tribal immunity to matters arising exclusively on tribal territory. The ability of tribes as sovereigns to conduct business dealings with parties outside of tribal territory is essential to the maintenance of a meaningful degree of tribal autonomy and self-determination. Without the benefit of immunity, the tribes would be faced with the impossible choice of limiting tribal activity to tribal territory or capitulating to state authority over tribal interests whenever potential claims can be pleaded in off-reservation facts. Either alternative would undermine the federal purposes of protecting the continuity of tribes as separate peoples.

As a practical matter, the issue of whether tribal sovereign immunity is to be waived in connection with the rights or remedies of a party to a commercial arrangement with a tribe is more appropriately addressed in the negotiation and formulation of the particular contract at issue. Indian law is a specialized area, but it is accessible, and there should be no surprises for a party entering into a transaction with reasonable preparation and adequate legal counsel. The immunity issue in the present case would have been effectively dealt with by an express waiver in the contract documents.

ARGUMENT

I. DETERMINATIONS REGARDING THE NATURE AND SCOPE OF TRIBAL SOVEREIGN IMMUNITY ARE A FUNCTION OF FEDERAL, NOT STATE, LAW.

The Oklahoma Court of Appeals in this case held that the state courts of Oklahoma have jurisdiction to hear a breach of contract action against the Kiowa Tribe, despite the absence of an express waiver of tribal sovereign immunity by the Tribe or a consent to suit by Congress, because (1) under Oklahoma state law such actions could be brought against the Oklahoma state government, (2) Congress has not expressly prohibited suit against tribes, and (3) the action does not infringe upon tribal self-government. Pet. App. 3 (citing *Hoover v. Kiowa Tribe*, 909 P.2d 59, 62 (Okla. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1675 (1996)).⁶ In effect, the Court of Appeals

⁶ The Oklahoma Supreme Court in *Hoover v. Kiowa Tribe* cited the New Mexico Supreme Court's decision in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989), and both decisions relied upon this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), that the recognition of the sovereign immunity of one state by another is a function of comity. *Hoover*, 909 P.2d at 62; *Padilla*, 754 P.2d at 850-51. See also *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, No. 86,184 (Okla. May 6, 1997) (following *Hoover* in upholding state court seizure of tribal tax revenues in satisfaction of judgment); *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (Okla. 1996) (following *Hoover* in applying state law to tribal immunity defense); and *First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299, 301 (Okla. 1996) (following *Hoover* in rejecting tribal immunity as a jurisdictional defense).

The *Padilla* decision is clearly contrary to the weight of federal law. See, e.g., *In re Greene*, 980 F.2d 590, 593-95 (9th Cir. 1993), cert.

made the determination of tribal sovereign immunity a function of state law, found an implicit waiver of tribal immunity by virtue of the fact that the contract at issue was performed in part off of the Kiowa Reservation, and disregarded both the express reservation of tribal rights in the contract at issue and the preemptive effect of federal law and policy in this matter.

This Court has long recognized that Indian tribes possess the same degree of inherent⁷ common law immunity from suit as does the United States itself.⁸ See, e.g., *Oklahoma Tax*

denied sub nom., *Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994) (*Padilla* itself recognizes that "[a]bsent federal authorization, tribal immunity is privileged from diminution by the states," 754 P.2d at 847, but then erroneously assesses the scope of tribal immunity under state rather than federal law); *Elliot v. Capitol International Bank & Trust, Ltd.*, 870 F. Supp. 733, 734 (E.D. Tex. 1994), aff'd, 102 F.3d 549 (5th Cir. 1996) ("the *Padilla* approach is generally rejected outside of the courts of that state"); and Note, *Sovereign Immunity - Indian Tribal Sovereignty - Tribes Not Immune From Suits Arising From Off-Reservation Business Activity - Padilla v. Pueblo of Acoma*, 102 Harv. L. Rev. 556, 562 (1988) ("The [*Padilla*] court's application of *Nevada v. Hall* to Indian tribes is not only a simplistic and unsound extension of precedent, but also a misguided and dangerous encroachment on tribal sovereignty").

⁷ An important feature of tribal sovereign immunity is the fact that it is not granted by the United States, but rather is a retained attribute of the preconstitutional sovereign status of a tribe. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *United States v. Wheeler*, 435 U.S. 313, 322 (1978). "[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them -- a reservation of those not granted." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680 (1979) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1908)).

⁸ Consider, e.g., that the primary statutory vehicle providing for federal funding of tribal programs, the Indian Self-Determination and Education Assistance Act of 1975, contains an express retention of tribal sovereign immunity. See 25 U.S.C. § 450n ("Nothing in this Act shall be construed as ... affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe.").

Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509-10 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Bryan v. Itasca County*, 426 U.S. 373, 383-90 (1976); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). Federal court adherence to the tribal immunity doctrine is intended to conserve tribal assets necessary to achieve the federal policy objectives of tribal self-determination and economic self-sufficiency. See, e.g., *Citizen Band Potawatomi*, *supra*; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering Co.*, 476 U.S. 877, 890-91 (1986); *American Indian Agricultural Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); F. Cohen, *Handbook of Federal Indian Law* 324-28 (1982 ed.); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1072-73 (1982).⁹ "If tribal assets could be dissipated by litigation, the efforts of the

⁹ The federal policy objectives of promoting tribal economic development and self-determination have been characterized by this Court as being of an "overriding" nature. See, e.g., *Citizen Band Potawatomi*, *supra*, 498 U.S. at 510; *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 14 & n. 5 (1987); *Three Affiliated Tribes*, *supra*, 476 U.S. at 890; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 & n. 10 (1980). Federal statutes declaring tribal self-government and economic development to be national policy objectives include the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*; the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 *et seq.*; the Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*; the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 *et seq.*; the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.*; the Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601 *et seq.*; the Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, 110 Stat. 4017, to be codified at 25 U.S.C. § 4101 *et seq.*; and the Indian Tribal Government Tax Status Act of 1982, 26 U.S.C. § 7871.

United States to provide the tribes with economic and political autonomy could be frustrated." *Cogo v. Central Council of the Tlingit and Haida Indians*, 465 F. Supp. 1286, 1288 (D. Alaska 1979).

Tribal sovereign immunity cannot be waived by implication, but can only be waived through express consent to suit by Congress or by the tribe itself. See, e.g., *Citizen Band Potawatomi*, *supra*; *Puyallup Tribe*, *supra*, 433 U.S. at 172-73; *United States Fidelity*, *supra*, 309 U.S. at 512-13. "[A] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed,'" and waivers must be strictly construed in favor of tribal interests. *Santa Clara Pueblo*, *supra* (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)). "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe*, *supra*, 433 U.S. at 172.

Issues of tribal sovereign immunity, like other aspects of Indian law, lie within the exclusive authority of the United States, and cannot be resolved by reference to state law. See generally *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 671 (1974); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 195 (1876); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (Indian affairs are the exclusive province of the federal government).

In this case, the Oklahoma Court of Appeals has found tribal immunity to be waived not by consent to suit but by the fact that the claims against the Tribe were pleaded in an off-reservation context. This amounts to an implicit waiver which, if upheld by this Court, would expose all Indian tribes to potential state court litigation in virtually any commercial matter which is not strictly intramural to a tribe and

geographically limited to a tribe's reservation. Such a result would have a tremendous chilling effect upon tribal economic development and self-determination.

The Oklahoma courts, like the New Mexico Supreme Court in the *Padilla* case, have avoided the authority of federal law governing tribal sovereign immunity by analogical reference to the interstate immunity issue addressed by this Court in *Nevada v. Hall*, 440 U.S. 410 (1979). See *Hoover v. Kiowa Tribe*, 909 P.2d 59, 62 (Okla. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1675 (1996); *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989). *Nevada v. Hall* held that, because the federal Constitution imposes no requirement for one state to recognize the immunity of another state, the forum state must decide for itself whether, and under what conditions, it will give effect to the immunity of a sister state in its courts. *Id.*, 440 U.S. at 418-27.

However, the rationale of *Nevada v. Hall* is inapposite to issues involving state recognition of tribal sovereign immunity. The tribes are not parties to the Constitution, and they are not states, but are domestic dependent nations towards which each state delegated exclusive authority to the federal government upon entering the Union. See also *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991) (the mutuality of concession under the Constitution that surrenders state immunity from suit by a sister state is not applicable to tribes, "as it would be absurd to suggest that tribes surrendered immunity in a convention to which they were not even parties"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (tribes "are not States, and the differences in the form and nature of their sovereignty make it treacherous to import" by analogy the constitutional principles affecting one to the other). More to the point,

because the tribal immunity doctrine is a creature of federal common law, it can only be restated by the United States itself and, to date, Congress has rarely limited the availability of tribal immunity.¹⁰ This Court specifically held, in *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911), that "[i]n passing the enabling act for the admission of Oklahoma ... Congress was careful to preserve the authority of the United States over the Indians, their lands and property, which it had prior to the passage of the act." *Id.*, 221 U.S. at 309. If there are to be any changes of the tribal immunity doctrine, Congress should be the forum within which a focused and deliberate review of the policy can be undertaken, involving the appropriate consultation with the tribes.

II. THE PRECEDENTS OF THIS COURT AND OF THE LOWER FEDERAL COURTS SUPPORT THE APPLICABILITY OF TRIBAL IMMUNITY TO A BREACH OF CONTRACT ACTION ARISING OFF-RESERVATION.

¹⁰ E.g., under Section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. § 477, and the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 503, Congress has permitted tribes to adopt corporate charters whose "sue and be sued" clauses have been interpreted by some federal courts as consents to suit. See, e.g., *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 669, 671, 673-74 (8th Cir. 1986) (holding that a "sue and be sued" clause in tribal housing authority charter constitutes consent to suit, but deferring to tribal court forum out of comity). See also Section 102 of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450f(c)(3)(A) (prohibiting availability of tribal sovereign immunity as a defense by insurers under liability insurance policies obtained by the Secretary of the Interior to provide coverage to tribes under the Federal Torts Claims Act for claims arising out of tribal administration of federally-funded programs).

The precedents of this Court addressing tribal sovereign immunity support the applicability of tribal immunity as a jurisdictional barrier to a breach of contract action arising off-reservation and brought in state court. Those decisions, without exception, focus on the preconstitutional sovereign status of the tribes and on the federal trust responsibility of preserving tribal assets from dissipation through litigation, and draw no distinction based on the situs of the claim.¹¹ See, e.g., *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-10 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering Co.*, 476 U.S. 877, 890-91 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56-58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940). Indeed, in *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977), this Court held that tribal immunity barred state jurisdiction over a tribe arising out of the tribe's exercise of treaty-reserved fishing rights on and off the reservation. *Id.*, 433 U.S. at 172-73. In *Citizen Band Potawatomi*, this Court recognized that tribal immunity bars an action for monetary damages against a tribe. *Id.*, 498 U.S. at 509-11.

At least five federal circuits have interpreted this Court's articulation of the tribal sovereign immunity doctrine as

¹¹ In *Hoover v. Kiowa Indian Tribe of Oklahoma*, 909 P.2d 59, 61 (Okla. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1675 (1996), the Oklahoma Supreme Court relied upon the statement of this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.*, 411 U.S. at 148-49. However, *Mescalero* does not mention tribal immunity from suit, and, as recognized by this Court in *Citizen Band Potawatomi*, the legal applicability of a state law to an Indian tribe is a distinct and separate issue from the ability of the state to enforce compliance. *Id.*, 498 U.S. at 514.

extending to tribal commercial activities and/or to tribal conduct off-reservation. In *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993), the First Circuit held that tribal sovereign immunity barred state jurisdiction over trespass actions against the Tribe arising off-reservation.

In *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966), the Fifth Circuit held that tribal immunity is available to bar an action arising out of tribal commercial activities in the same manner as to a tribe generally, because "[i]t is in such enterprises and transactions that the Indian tribes and Indians need protection."

In *American Indian Agricultural Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985), the Eighth Circuit held that tribal immunity barred jurisdiction over a breach of contract action, emphasizing the fact that immunity is "necessary to promote tribal self-determination, economic development, and cultural autonomy."

In *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989), the Ninth Circuit held that tribal immunity barred jurisdiction over a breach of contract action arising out of a bingo agreement with the Band, noting that "[c]onsent [to suit] by implication, whatever its justification, still offends the clear mandate of Santa Clara Pueblo." Also, in *In re Greene*, 980 F.2d 590, 596 (9th Cir. 1993), *cert. denied sub nom., Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994), the Ninth Circuit held that tribal immunity barred suit by a bankruptcy trustee against a furniture business owned by a tribe arising out of an off-reservation transaction, citing this Court's continuous and broad reaffirmation of the tribal immunity doctrine as requiring recognition that tribal immunity under federal common law contains an "extraterritorial component."

Most notably, for the purposes of this case, the Tenth Circuit, in *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 57 (1995), held that tribal immunity bars state court jurisdiction over third party claims for damages brought by employees of a former manufacturing plant operated by the Nation off-reservation, and that the location of tribal commercial activity cannot be determinative of whether a tribe is entitled to immunity because "the point of sovereign immunity ... is the power of self-determination." *Id.*, 47 F.3d at 1064 (quoting *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992)); *see also Ramey Const. Co. v. Apache Tribe*, 673 F.2d 315, 320 (10th Cir. 1982)(upholding dismissal of breach of contract action on tribal immunity grounds).

The rule on tribal immunity is settled law in the federal courts. Further, the *Padilla* and *Hoover* decisions are not representative of state court understandings of the doctrine. *See, e.g., Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292-96 (Minn. 1996)(recognizing immunity of tribal corporation for civil claims partially arising off-reservation); *In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 560, 658 N.E.2d 989, 993, 635 N.Y.S.2d 116, 120 (1995)(immunity extends to a tribally-owned nonprofit corporation chartered under state law); *C & B Investments v. Wisconsin Winnebago Health Dept.*, 198 Wis. 105, ___, 542 N.W.2d 168, 170 (Wis. Ct. App. 1995)(immunity extends to tribal health board in breach of contract action); *North Sea Prods., Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938, 941 (Wash. 1979)(immunity bars state garnishment action against tribe despite tribal commercial activity off-reservation); *People v. LeBlanc*, 399 Mich. 31, ___, 248 N.W.2d 199, 212-13 (1976)(tribe immune from state regulation of treaty-reserved fishing off-reservation); *State v. Gurnoe*, 53 Wis.2d

390, ___, 192 N.W.2d 892, 902 (1972)(same); *White Mountain Apache Tribe v. Shelley*, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971)(immunity extends to tribally-owned business); and *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 423 (Ariz. 1968)(immunity applies to claims arising from accident at tribally-owned amusement park off-reservation).¹² The rationale of the *Hoover* decision, and of the Oklahoma Court of Appeals in the present case, are at odds with the observance of the immunity doctrine in other states. Indeed, it is the view of the Fond du Lac Band that this case, when considered in the overall context of the generally litigious posture towards tribes by the State of Oklahoma, is indicative of a fundamental intolerance of tribal existence itself.

III. THE APPLICABILITY OF THE TRIBAL IMMUNITY DOCTRINE TO TRIBAL CONTRACTUAL RELATIONSHIPS INVOLVING OFF-RESERVATION PERFORMANCE IS ESSENTIAL TO THE MAINTENANCE OF TRIBAL SELF-GOVERNMENT AND TO THE FULFILLMENT OF THE FEDERAL TRUST RESPONSIBILITY TO PRESERVE TRIBAL ASSETS.

¹² *Contra Dixon v. Picopa Const. Co.*, 160 Ariz. 251, ___, 772 P.2d 1104, 1107-10 (1989)(tribally-owned corporation governed by a tribally-elected board of directors deemed to be too far removed from tribal control to benefit from immunity). For a critique of the *Dixon* and *Padilla* decisions, *see Dietrich, Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 Wash. L. Rev. 113, 124-27 (1997).

Tribal sovereign immunity, and the purposes underlying the immunity doctrine, cannot be limited to the on-reservation or governmental functions of the tribe without seriously impairing the ability of tribes to maintain any appreciable degree of autonomy or self-determination. As recognized by this Court in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering Co.*, 476 U.S. 877 (1986), "[t]he common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance." *Id.*, 476 U.S. at 891. The real success of the immunity doctrine in achieving these federal policy purposes is not found in the cases arising in which tribal immunity is raised as a jurisdictional defense, but in the doctrine's deterrent effect of discouraging the multitude of claims that would otherwise be brought. Without the benefit of immunity, tribal self-government and economic development would be undermined by an endless stream of claims against tribal resources grounded in state law and pleaded in off-reservation facts.

The preservation of the tribal immunity doctrine is essential to tribal survival because the continued vitality of tribes depends upon their ability to maintain their measured separatism without converting reservations to detention areas outside of which tribes dare not venture for fear of loss of their sovereign identity. Meaningful tribal self-determination requires that tribes have the ability to conduct business with the outside world without becoming subordinate to and assimilated by the laws of the dominant culture. This is the essential promise by the United States to the tribes, in every treaty and statute: "we will protect you against extinction." And, as Justice Black stated: "Great nations, like great men, should keep their word." *Federal Power Comm'n v.*

Tuscarora Indian Nation, 362 U.S. 99, 142 (1960)(Black, J., dissenting).

IV. PARTIES TO CONTRACTS WITH INDIAN TRIBES HAVE WHATEVER RIGHTS AND REMEDIES AS ARE RESERVED UNDER THE CONTRACT DOCUMENTS.

Parties to contractual relationships with Indian tribes are not at a legal disadvantage or disability simply because the legal rules applicable to such transactions reside in a specialized area. A contract between an Indian tribe and an off-reservation business is not unlike a transaction between any two parties in a market economy: both parties are presumed to negotiate the transaction with their "eyes open," and are each responsible for researching the merits and contingencies of a proposal, and for obtaining the appropriate professional advice before entering into a contract. To the extent that legal advice is sought in connection with a proposed transaction, the rules of professional conduct for attorneys universally require a lawyer to render competent representation, which includes the responsibility to provide "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." American Bar Association, *Model Rules of Professional Conduct* Rule 1.1 (1983). The rule of competence further requires an attorney to recognize whether it is necessary "to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question." *Id.*, Comment 1.

The unique rules governing Indian law generally, and the tribal immunity doctrine in particular, are the law of the land, and are the basis of settled expectations by the tribes, federal

and state governments, and members of the business community. The Oklahoma and New Mexico courts have attempted to restate the rules regarding tribal immunity in a manner which directly contravenes two centuries of federal common law. The Kiowa Tribe is presently bearing the burden of their experiment. However, such a drastic change in tribal immunity law is neither necessary or desirable, and poses a direct challenge to the exclusivity of federal control over Indian affairs in our Nation.

"Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish." *American Indian Agricultural Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985). A business that is pursuing a particular transaction with a tribe may negotiate an express waiver of tribal immunity as a condition of the transaction, and the tribe will presumably decide whether the particular proposal is important enough to tribal interests to grant such a waiver. If a waiver had been negotiated as part of the contract at issue in the present case, this case would not have been necessary. Because the Kiowa Tribe has the authority to waive its immunity in a contract, it is in the negotiation and language of the contract at issue in the present case that the question of a waiver should have been addressed. If a waiver had been granted, immunity would not have been unavailable as a jurisdictional defense by the Tribe in connection with that contract, and this case would not have been necessary. However, Manufacturing Technologies, Inc. did not insist on a waiver as part of the transaction, and in fact agreed to a deal which expressly reserved the sovereign rights of the Tribe. The sovereign rights of the Kiowa Tribe which were expressly reserved in the promissory note at issue are reserved under federal statutory and common law, and include the right to assert sovereign immunity against the unconsented

operation of state law upon the Tribe. For this Court to make further inquiry into this matter would depart from the cardinal principle of contract law that "the meaning of a contract must be determined from the four corners of the instrument." 17A C.J.S. *Contracts* § 296(2)(1963).

The Fond du Lac Band is a party to contracts with off-reservation businesses amounting to several million dollars a year. It has been the experience of the Band that attorneys representing those businesses are aware of the tribal immunity doctrine, and either negotiate the terms for a waiver of immunity, or secure alternative remedies, within the contract. There are no secrets or surprises, only a unique body of law reflecting the unique legal status of the Band as a federally recognized Indian tribe. A radical change in the law on tribal immunity would severely disrupt settled law and expectations.

A recent article in a northern Minnesota business publication concerning the conduct of business between a tribe and off-reservation vendors stated:

Nearly every business transaction is the product of some negotiation. Because a tribal government may waive its sovereign immunity, a non-tribal business seeking to supply goods or services under contract may try to negotiate a provision that may be open to linking dispute resolution in a tribal court using a specified legal framework, specified by the UCC or some other common body of business law ...

Doing business with tribes requires adjusting to unfamiliar rules. It also may require submitting

disputes to a tribal court. Don't let that be a barrier. Instead, take care to ensure dispute resolutions are spelled out in the contract, and understood by all parties at the onset.

John D. Kelly, "Doing Business with Indian Tribes," *Business North*, August 1997, p. 13.

The point is, the tribal immunity doctrine works as an instrument of achieving the purposes of federal Indian policy, but needn't constitute an obstacle to a fairly negotiated contractual quid pro quo, provided that the parties to contracts with tribes are diligent in the protection of their own interests; however, in the event that they are not attentive to the unique legal status of the tribes, it is not an appropriate or desirable function of federal law or of this Court to protect them from their own deals.

CONCLUSION

Tribal sovereign immunity is exclusively governed by federal law. The State of Oklahoma's denial of the availability of tribal immunity as a jurisdictional defense by the Kiowa Tribe in this case is contrary to the overwhelming weight of federal authority, including numerous precedents of this Court. Further, a limitation of the immunity doctrine at this late time to commercial disputes arising in tribal territory would contravene the federal policy of promoting tribal self-determination and economic development, and would interfere with the settled expectations of the tribes and parties doing business with tribes by over a century of federal precedent. The appropriate place to address the tribal immunity issue in commercial dealings is in the negotiation and structure of individual contracts.

For these reasons, the decision of the Oklahoma Court of Appeals in this matter should be reversed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

KIOWA TRIBE OF OKLAHOMA,
v. *Petitioner,*

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

On Writ of Certiorari to the
Oklahoma Court of Appeals

**BRIEF AMICI CURIAE OF THE ASSINIBOINE AND
SIOUX TRIBES OF THE FORT PECK RESERVATION,
HO-CHUNK NATION, NOTTAWASEPPI HURON BAND
OF POTAWATOMI INDIANS, STANDING ROCK SIOUX
TRIBE, CONFEDERATED TRIBES OF THE COLVILLE
RESERVATION, AND ST. CROIX CHIPPEWA INDIANS
OF WISCONSIN IN SUPPORT OF PETITIONER**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1037

KIOWA TRIBE OF OKLAHOMA,
v. *Petitioner,*

MANUFACTURING TECHNOLOGIES, INC.,
Respondent.

On Writ of Certiorari to the
Oklahoma Court of Appeals

**BRIEF AMICI CURIAE OF THE ASSINIBOINE AND
SIOUX TRIBES OF THE FORT PECK RESERVATION,
HO-CHUNK NATION, NOTTAWASEPPI HURON BAND
OF POTAWATOMI INDIANS, STANDING ROCK SIOUX
TRIBE, CONFEDERATED TRIBES OF THE COLVILLE
RESERVATION, AND ST. CROIX CHIPPEWA INDIANS
OF WISCONSIN IN SUPPORT OF PETITIONER**

INTEREST OF AMICI ¹

Each of the Amici Tribes is a federally recognized Indian tribe responsible for providing a broad range of governmental services in areas such as education, health care, employment, housing, environmental protection, nat-

¹ Pursuant to Rule 37.6 of the Rules of this Court, counsel for Amici states that no counsel for a party authored this brief in whole or part, and that no person or entity other than Amici and their counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief amici curiae, and those consents have been filed with the Clerk.

ural resource management, and law enforcement to Indians and other people living on and near their reservations. Each faces tremendous challenges in carrying out these duties. For each of these tribes, the size² and location³ of its reservation has resulted in significant

² For example, the Ho-Chunk Nation has 5779 members and only 845.23 acres of trust land scattered over 14 Wisconsin counties. According to tribal census records, it had 22.5% unemployment in 1990, while unemployment among all Wisconsin residents was 4.4%. In 1995, 64% of Ho-Chunk households had incomes less than 50% of the median county income. The St. Croix Chippewa Indians of Wisconsin is similarly situated. It occupies only 3,000 acres of land that are dispersed across three Wisconsin counties, and is responsible for providing services to approximately 3500 member and non-member Indians. As reported by the 1990 U.S. Census, Indians at St. Croix had median household incomes of \$14,500, with only 29% owning homes, while the median household income for all Wisconsin residents was \$28,000, with 67% owning homes. Similarly, the Nottawaseppi Huron Band of Potawatomi Indians holds only 120 acres of land as a reserve in Michigan. The Band has 612 members with 25% unemployment.

³ The isolated locations of the reservations occupied by the Standing Rock Sioux Tribe, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, and the Confederated Tribes of the Colville Reservation, have left each with unemployment and poverty rates that are two to four times the national average, with correspondingly higher deficits in health and education. For example, as of 1990 the median household income for all persons nationwide was \$30,056, with only 13.1% of the U.S. population living below the poverty level. See Indian Health Service, *Regional Differences in Indian Health 1995*, at 27. But for Indians within the Aberdeen Area of the Bureau of Indian Affairs, including those on the Standing Rock Sioux Reservation, the median household income was \$12,310, with 49.6% living below the poverty level. *Id.* For Indians within the Billings Area, including those on the Fort Peck Reservation, median household income was \$14,249 with 44.6% living in poverty. *Id.* And for Indians within the Portland Area, including those at Colville, the median income was \$21,123, with 29.2% living in poverty. *Id.* Nationwide, the unemployment rate among men in 1990 was 6.4%, but among Indian men within the Aberdeen Area the rate was 26.5%, and within Billings, 29.8%. *Id.* at 26. The health problems affecting Indian people are evi-

barriers to its ability to foster economic development on the reservation, and has left a legacy of high levels of unemployment and poverty, inadequate housing, poor health, and lack of educational opportunity.

To address these problems, all Amici Tribes have undertaken to establish business and economic activities on their reservations that will enable the tribes to provide the facilities and services necessary to meet the needs of their citizens. This has become all the more important as federal spending on programs for American Indians has declined⁴—putting greater pressure on tribes to develop sources of revenue from which to fund these governmental responsibilities.

Moreover, for each of these tribes, many goods and services required for fundamental government operations are simply unavailable on the reservation. Tribes must go outside of Indian country to acquire essential commodities—vehicles for law enforcement, medical supplies, or office equipment. In fact, for most tribes even basic banking services cannot be secured on the reservation. As a result, all Amici Tribes have found it necessary to contract for financing, goods, or services with non-Indians whose places of business lay outside Indian country. These contracts include agreements with off-reservation entities made under the authority of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*

In the negotiation of such contracts, all Amici Tribes have discussed and agreed upon terms regarding remedies

denced in part by comparison of mortality rates. During the period 1990-1992, the age adjusted mortality rate for all races nationwide was 513.7 per 100,000 persons, while the rate among Indians was 1048.7 within the Aberdeen Area, and 896.2 within the Billings Area. *Id.* at 45.

⁴ Library of Congress Congressional Research Service, Memorandum to the U.S. Senate Committee on Indian Affairs on Indian-Related Federal Spending Trends, at CRS-11 (April 15, 1996).

in the event of breach. These have included waivers of sovereign immunity that specifically define the scope of the waiver—including the remedies available, the choice of law, the forums in which the claim may be enforced, and the property from which a judgment might be satisfied. Such waivers are expressly stated, knowingly made, and the product of negotiation by the parties. As a result, both parties to the contract enter into it with full knowledge of their respective rights, remedies and risks.

All Amici Tribes have an interest in the rules governing tribal sovereign immunity, as their ability to carry out their governmental responsibilities is directly affected by the costs of defending against lawsuits in forums to which they have not consented and the risk of being subject to liability that they had not anticipated and for which they have no protection.

Amici Tribes file this brief to urge the Court to apply this Court's prior decisions that Indian tribes retain their sovereign immunity from suit absent an express waiver by the tribe or Congress, and that the state courts lack jurisdiction over a tribe that has not waived its immunity.

STATEMENT OF THE CASE

The Oklahoma Court of Appeals affirmed a judgment for damages entered against the Kiowa Tribe on a promissory note in which the Tribe had expressly reserved its sovereign rights.⁵ In so ruling, the Court recognized that the Kiowa Tribe had "not waived its sovereign rights," but held that because aspects of the transaction occurred outside Indian country⁶ the state court had "jurisdiction

⁵ The note in a section titled "Waivers and Governing Law" recited that "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Ex. A to Petition on Promissory Note, at 2, in *Manufacturing Technologies, Inc. v. Kiowa Tribe*, No. CJ 93-6523 (District Court, Oklahoma County).

⁶ While the opinion does not describe the facts on which the Court based this conclusion, the note recites that it was executed

to hear a claim and enter a judgment for damages against" the Tribe. Pet. App. at 2-4, *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, No. 86,489 (Okla. App. June 28, 1996).

The Court based its assumption of jurisdiction over the Tribe on prior decisions of the Oklahoma Supreme Court, *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996), and *First National Bank in Altus v. Kiowa, Comanche, and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996). The Court found that the making of the promissory note constituted an off-reservation activity of the Tribe and held that the note was enforceable against the Tribe in state court because the state's law allowed breach of contract actions to be asserted against the state. Pet. App. at 3, 4. The Court further ruled that state jurisdiction exists unless "expressly prohibited by Congress," and that the assertion of state jurisdiction to enter a judgment of damages against an Indian tribe "does not infringe on tribal self-government." Pet. App. at 3. Since then, the Oklahoma Supreme Court has reaffirmed the rule stated in *Hoover*, and held that the questions of tribal sovereign immunity and the state's jurisdiction over Indian tribes are controlled by "state law." *Aircraft Equipment Company v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361, 362 (Okla. 1996).

SUMMARY OF ARGUMENT

The decision below is a radical departure from three fundamental and well established principles of federal Indian law that this Court has never questioned: *first*, that the existence of a tribe's sovereign immunity is controlled exclusively by federal law, *Santa Clara Pueblo v. Martinez*,

by the Tribe within Indian country at the Tribe's offices in Carnegie, Oklahoma, with payments to be made at the lender's offices outside of Indian country. Ex. A to Petition on Promissory Note at 1.

436 U.S. 49, 58 (1978); *second*, that only an unequivocal statement by Congress or the tribe is effective to waive the tribe's sovereign immunity from suit, *id.*; *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-73 (1977); and *third*, that state courts lack jurisdiction over Indian tribes, *Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976).

The Oklahoma Court of Appeals turned each of these bedrock principles of federal Indian law on its head, and replaced them with an unprecedented test under which: the state courts presumptively possess civil jurisdiction over Indian tribes; the existence of a tribe's immunity from suit is a question of state—not federal—law; and the federal law rule requiring an express waiver of immunity is supplanted by one under which even an express reservation of sovereign rights may be irrelevant to the existence of the immunity. This test cannot be reconciled with established federal law or the policies that federal law is intended to effect.

If the decision were allowed to stand, the rule would have devastating consequences for Indian tribes. A tribe's access to basic goods and services that are unavailable within Indian country would be held hostage to the tribe's waiver of its sovereign immunity to suits in state court, a result prohibited by this Court's decision in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). Innumerable lawsuits would be initiated in state court against Indian tribes simply upon an allegation that some aspect of the transaction occurred outside Indian country. Tribes, most of which have no choice but to keep tribal funds in off-reservation banks, would be compelled to appear and defend, and the purpose of the immunity—to protect the sovereign from the burden of litigation to which it has not consented—would be obviated. The cost of defending against these actions would drain tribal treasuries, divert tribal assets and resources from providing essential government services to Indian people, and undermine the decades of federal law and policy that have

sought to promote tribal self-determination and economic development. Moreover, all of these effects would be felt directly on the reservations.

None of this is necessary. The problem presented by this case is easily avoided by application of the existing rules of federal law. Under these simple rules, persons seeking to contract with Indian tribes may ensure that they have enforceable remedies against the tribe by negotiating for and obtaining an appropriate waiver of tribal immunity in the text of the contract itself.

The decision of the Oklahoma Court of Appeals should be reversed.

ARGUMENT

I. UNDER SETTLED RULES OF FEDERAL LAW, TRIBES ARE IMMUNE FROM SUIT ABSENT AN ACT OF CONGRESS OR THE TRIBE'S EXPRESS WAIVER OF THAT IMMUNITY, AND STATES LACK JURISDICTION OVER TRIBES THAT HAVE NOT WAIVED THEIR IMMUNITY.

A. Tribal sovereign immunity, as an aspect of a tribe's inherent sovereignty, is protected by federal law and may only be waived by Congress or the tribe.

Tribal sovereign immunity is defined and controlled by federal law. See *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). As this Court has repeatedly made clear, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-11 (1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). A tribe's sovereign immunity is an "aspect of tribal sovereignty," *Santa Clara Pueblo*, 436 U.S. at 58, rooted in

the unique relationship between the United States and the tribes. This immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986).

Because immunity is an aspect of a tribe's sovereignty, recognized by federal law, the power to limit or waive that immunity is vested exclusively in Congress and the tribe. *Santa Clara Pueblo*, 436 U.S. at 58-59; *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-73 (1977); *Fidelity & Guaranty Co.*, 309 U.S. at 512. The states have no power in this regard. To the contrary, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1986). The "suability of the United States and the Indian Nations . . . depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *Fidelity & Guaranty Co.*, 309 U.S. at 514.

The lower court reached the opposite conclusion, and decided that a tribe's immunity from suit could be decided by application of "state law" rather than federal law by relying on other state court decisions that incorrectly extended the comity principles of *Nevada v. Hall*, 440 U.S. 410 (1979), to Indian tribes. *Nevada v. Hall* is inapplicable here. The question decided in *Nevada v. Hall* was whether the Constitution required that the California courts give effect to limits imposed by Nevada on its waiver of sovereign immunity, for a tort action involving a Nevada official brought in California by California residents arising out of a traffic accident occurring there. The Court held that nothing in the text or framework of the Constitution regarding the relationship between the states required California to give effect to the Nevada official's immunity. 440 U.S. at 418-27. Rather, based

on the plan of the Constitution and intent of the Framers, the Court found that as between the states, questions of whether to recognize the sovereign immunity of a sister state with regard to tort claims⁷ was a matter of comity to be resolved by the states. Thus, California could determine the existence of the Nevada official's immunity by application of California law.

The very constitutional framework that permitted the Court, in *Nevada v. Hall*, to allow principles of comity to control questions of sovereign immunity between the states precludes application of those comity principles to matters involving Indian tribes. Indian tribes "are not States, and the differences in the form and nature of their sovereignty makes it treacherous" to treat them as such. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Moreover, the relationship between states and Indian tribes is defined by the Constitution, under which the states relinquished, without limitation, all authority over Indian affairs to the federal government. The settled rule is that "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715-16 (1943). See also *Seminole Tribe of Florida v. Florida*, 517 U.S. —, 134 L.Ed.2d 252, 276-77 (1996).

⁷ The ruling is expressly limited to tort claims arising out of traffic accidents. The Court noted "[w]e have no occasion, in this case, to consider whether different state policies, . . . might require a different analysis or a different result." *Nevada v. Hall*, 440 U.S. at 424 n.24. This Court has not since expanded its holding beyond that scope.

The importance of exclusive federal control over Indian affairs became apparent from the time of the Articles of Confederation. The Articles had imposed two limitations on the power of Congress over Indian affairs—"the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); Art. 9 *Journals of the Continental Congress, 1774-1789*, IX, at 919 (Lib. of Cong. ed. 1904-1937). But these limitations led to disagreement. While the Continental Congress asserted exclusive power to deal with Indian tribes, a number of states disputed this view and independently dealt with Indian tribes. *Journals, supra*, at XXXIII, at 455, 460.

To resolve further controversy, the limitations contained in the Articles were omitted from the text of the Constitution. See *Forty-Three Gallons*, 93 U.S. at 194; see U.S. Const., Art. I, § 8, cl. 3. As this Court explained, the Framers recognized that those limitations "rendered the [federal] power of no practical value," and that "the only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government. Their peculiar habits and character required this . . ." *Forty-three Gallons*, 93 U.S. at 194; accord, *The Federalist No. 42* at 284 (J. Cooke ed. 1961) (Madison, explaining that the Indian Commerce Clause was "properly unfettered from the two limitations contained in the articles of Confederation.") Thus, by the Constitution, "the whole power of regulating the intercourse with . . . [the Indians] was vested in the United States," *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832), as there could "be no divided authority" between the states and the national government in Indian affairs. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867). Congress' power to regulate commerce with Indians both within and outside Indian country was to be exclusive. *Forty-Three Gallons*, 93 U.S. at 194-95.

Having relinquished their authority over Indian affairs to the exclusive control of the federal government, the states lack any inherent authority to determine, as a matter of comity or by application of rules of state law, whether to recognize tribal sovereign immunity.⁸ This Court's analysis in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), demonstrates that the comity principles of *Nevada v. Hall* cannot apply to Indian tribes:

⁸ For the same reason, the lower court erred in concluding that the state court has inherent jurisdiction to adjudicate a claim against an Indian tribe. Unlike the rules governing state jurisdiction over individual Indians off-reservation, federal law bars state court jurisdiction to adjudicate claims against an Indian tribe unless Congress has expressly granted such jurisdiction. *Bryan*, 426 U.S. at 388-89. While Congress can confer such power on the state courts, see *Parker v. Richard*, 250 U.S. 235, 239 (1919), it has not done so for the claims raised here. And the specificity with which Congress must speak is established by *Bryan*. Even where Congress had provided that certain states "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties . . .," the statute did not confer any "state jurisdiction over the tribes themselves." 426 U.S. at 388-89. The absence of such statute here is fatal to the state court's assertion of jurisdiction over the tribe, and is all the more so without a waiver of tribal sovereign immunity.

Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989), is not to the contrary. The issue decided there was whether the complaint filed in state court raised a federal question that would permit removal of the action to federal court. This Court concluded that it did not, but stated that the tribe's immunity from suit might provide a federal defense to the claims. *Id.* at 840-41. In so ruling, however, this Court did not decide the merits of the immunity defense, nor the state court's jurisdiction over the tribe. Rather, like this Court's decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *Graham* addressed a matter of procedure under which the state courts, like tribal courts, are allowed "initially to respond to an invocation of their jurisdiction." See *Strate v. A-1 Contractors*, 65 U.S.L.W. 4298, 4301 (U.S. April 28, 1997). But the decision to allow another court to initially determine its own jurisdiction is not a ruling on the ultimate question of that court's "adjudicatory authority." See *id.*

What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with . . . Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

Id. at 782 (citations omitted); *Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 4540, 4542 (U.S. June 23, 1997).⁹

B. Waivers of tribal sovereign immunity cannot be implied but must be unequivocally expressed.

Applying the same standard that governs waivers of the United States' sovereign immunity, and the States' Eleventh Amendment immunity, this Court consistently has held that a waiver of tribal immunity "cannot be implied, but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59 (citing *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. King*, 395 U.S. 1, 4 (1969)); accord *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). In the absence of an express waiver of sovereign immunity by the tribe or "congressional authorization," the 'Indian Nations are exempt from suit.' *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *Fidelity & Guaranty Co.*, 309 U.S. at 512); *Puyallup Tribe*, 433 U.S. at 172.

The requirement of an express waiver has been consistently applied. It has never depended on the nature of the activity underlying the claim. See *Santa Clara Pueblo*, 436 U.S. at 51-52 (civil rights); *Turner*, 248 U.S. at 357-58 (torts); *Fidelity & Guaranty Co.*, 309 U.S. at 510

⁹ If the comity principles of *Nevada v. Hall* were deemed applicable, and allowed states to apply state law to determine the existence of a tribe's sovereign immunity, then those same comity principles would permit tribal courts to determine, as a matter of tribal law, whether a state retains its immunity from suit on like claims presented in tribal court.

(lease). It has applied equally to claims involving commercial transactions, as governmental functions, *Potawatomi*, 498 U.S. at 510, whether the claim is brought by a tribal member, *Santa Clara*, or a non-Indian, *Fidelity*, or a state, *Potawatomi*, and whether it is asserted in federal, *Santa Clara*, or state court. *Puyallup Tribe*, 433 U.S. at 172-73.

Nor has a tribe's sovereign immunity turned on the place where the transaction giving rise to the claim might be said to have occurred or its effects felt. To the contrary, this Court has applied the same fundamental principles and upheld tribal sovereign immunity from suits arising from tribal activities occurring *outside* the tribe's reservation, to the same extent as those arising within reservation boundaries. *Puyallup Tribe*, 433 U.S. at 172-73. The lower federal courts have done the same. Indeed, in contract actions such as this, the courts have resolved questions regarding tribal immunity by determining whether an act of the tribe or Congress expressly waived that immunity—not by undertaking to discern whether the situs of the contract is on- or off-reservation.¹⁰ And the federal courts that have specifically addressed the question of a tribe's sovereign immunity to a suit arising from a commercial transaction occurring outside the reserva-

¹⁰ See, e.g., *Rosebud Sioux v. Val-U Const. Co.*, 50 F.3d 560, 563 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1997); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *McClendon v. United States*, 885 F.2d 627, 629-30 (9th Cir. 1989); *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1376-77 (8th Cir. 1985); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064, 1066 (1st Cir. 1979); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Thebo v. Choctaw Tribe*, 66 F. 372, 375-76 (8th Cir. 1895); *Adams v. Murphy*, 165 F. 304, 311-12 (8th Cir. 1908).

tion have concluded that immunity exists absent express tribal waiver.¹¹

Congress is certainly "at liberty to dispense with such tribal immunity or to limit it" and has, in fact, authorized various classes of suits against Indian tribes.¹² But in so doing, Congress has been very careful to define the precise circumstances under which tribes may be sued, balancing the importance of immunity to the tribe's ability to carry out its governmental functions, against the need to accord a remedy to individuals who may be adversely affected by the exercise of those functions.¹³ As a result, congress-

¹¹ See *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir.), cert. denied, 116 S.Ct. 57 (1995); *Green v. Mt. Adams Furniture*, 980 F.2d 590, 598 (9th Cir. 1992), cert. denied, 510 U.S. 1039 (1994); *Frederico v. Capital Gaming Int'l Inc.*, 888 F. Supp. 354 (D.R.I. 1995); *Elliott v. Capital Investment Bank*, 870 F.Supp. 733 (E.D. Tex. 1994), aff'd, 102 F.3d 549 (5th Cir. 1996). See also *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993) (tribal sovereign immunity applies to actions arising within as well as without Indian country and barred a direct action against the tribe claiming trespass on lands outside of the reservation boundaries); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957) (tribe did not lose its immunity by accepting a charter issued by the state).

¹² See *Potawatomi*, 498 U.S. at 510. Congress has authorized certain claims to be brought by tribal members and others against the tribe, e.g., Appropriations Act of March 3, 1905, c. 1479, § 1, 33 Stat. 1048, 1071; see *The Cherokee Intermarriage Cases*, 203 U.S. 76 (1903); *Green v. Menominee Tribe*, 233 U.S. 558 (1914), and between different tribal groups. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403; see *Healing v. Jones*, 210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963); Appropriations Act of March 3, 1883, c. 141, 22 Stat. 581, 585; *The Cherokee Trust Funds*, 117 U.S. 288 (1886). Congress has also authorized tribes to be joined in suits for adjudication of water rights. Act of July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560, codified at 43 U.S.C. § 666; see *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

¹³ These factors were equally relevant to Congress' decision on whether to establish a federal cause of action to enforce the rights

sional waivers of tribal immunity have been limited in number and narrowly tailored,¹⁴ with deference otherwise given to the tribe to make decisions on when and how to waive its immunity. See *Santa Clara Pueblo*, 436 U.S. at 58-72.

C. Congress has not waived tribal immunity, and no such waiver can be implied without undermining tribal sovereignty and federal law and policy for tribal self-determination and economic development.

Congress has *not* chosen to abrogate tribal immunity for the kind of claim raised here. To the contrary, Congress has "consistently reiterated its approval of the immunity doctrine," *Potawatomi*, 498 U.S. at 510, in terms that do not permit the existence of a tribe's immunity to

created by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. Considering the potential disruption that federal suits might have on the tribal government's ability to carry out its functions, Congress chose to limit the federal court remedies under the Act to habeas corpus, and otherwise deferred to the tribes to make appropriate decisions regarding the remedies to be provided in tribal forums. *Santa Clara Pueblo*, 436 U.S. at 58-72.

¹⁴ For example, in the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, Congress authorized tribes to adopt charters for the express purposes of engaging in business enterprises. 25 U.S.C. § 477. Some of those business charters include "sue and be sued" clauses waiving the entity's immunity from suit, although those charters may also expressly limit the assets from which a judgment may be satisfied. See *Maryland Casualty Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), cert. denied, 385 U.S. 918 (1966). More recently, in the Indian Self-Determination Act of 1975, Congress effected a limited waiver of tribal sovereign immunity by requiring the maintenance of insurance in connection with work done under the act, and further directing that the insurance policy prohibit the insurer from asserting the tribe's immunity as a defense to a claim covered by the policy. 25 U.S.C. § 450f(c)(3)(A). In addition, some federal agencies have required waivers of tribal sovereign immunity as a condition of participation in the program. See *Weeks Const. Co. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 671 n.2 (8th Cir. 1986) (Department of Housing and Urban Development).

turn on whether aspects of a transaction might be said to have occurred within or outside Indian country.

Significantly, Congress reaffirmed tribal sovereign immunity in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450, 450n(l),¹⁵ which is one among many federal statutes intended to promote "Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.'" *Potawatomi*, 498 U.S. at 510 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35, & n.17 (1983). Moreover, as reflected by the federal statutes enacted to carry out these policies, Congress has understood that tribal self-determination and economic development cannot be accomplished exclusively within Indian country.¹⁶ In-

¹⁵ The Self-Determination Act recites that "[n]othing in this Act shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 450n(l). Tribal sovereign immunity was more recently affirmed by Congress in the American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. § 3746.

¹⁶ Congress has historically recognized that Indian commerce is not and cannot be confined to the reservation boundaries. This is illustrated by the federal Indian trader statutes, 25 U.S.C. §§ 261-264, and their application to nonresident vendors, see *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160, 165 (1980). It is also illustrated by the Non-Intercourse Act, 25 U.S.C. § 177, and the federal statutes regulating liquor trade with Indians both within and outside Indian country, see *Dick v. United States*, 208 U.S. 340 (1908); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876). It is further reflected by the treaties reserving Indian rights to hunt and fish outside the reservation boundaries, *Antoine v. Washington*, 420 U.S. 194 (1975), the exercise of which is regulated and managed by the tribes outside the reservation. See, e.g., *Settler v. Lameer*, 507 F.2d 231, 237-38 (9th Cir. 1974); *United States v. Washington*, 520 F.2d 676, 686 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); *Lac Courte Oreilles Band v. Wisconsin*, 668 F.Supp. 1233, 1241-42 (W.D.Wis. 1987); *United States v. Michigan*, 471 F.Supp. 192, 273 (W.D. Mich. 1979).

deed, many provisions of these statutes contemplate that the tribe provide services, operate programs and engage in enterprises both within and outside the reservation boundaries. For example, the Indian Financing Act, 25 U.S.C. § 1521, provides federal grants to tribes and individual Indians "to establish and expand profit making Indian owned enterprises on or near reservations." The Indian Child Welfare Act, 25 U.S.C. §§ 1931-1933, authorizes federal grants for the establishment and operation of Indian child and family service programs both on and off reservation. And by the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c), (m), tribes are to provide health care services to all Indians living on or near the reservation, within a federally defined service area. Consistent with these statutes, and the reality that the contracts made by tribes under authority of the Self-Determination Act will often involve parties and activities outside the boundaries of the reservation, Congress reaffirmed tribal sovereign immunity without geographic limitation.¹⁷

Sovereign immunity, and the right to decide when and how to waive that immunity, are critical components of tribal self-determination and economic development. The principle of sovereign immunity recognizes that no government can fulfill its obligations to its citizenry while also defending itself against any and all litigants in a judicial forum. Sovereign immunity—for any government

¹⁷ While reaffirming tribal sovereign immunity, Congress also provided remedies for claims that might be made against tribal employees or contractors carrying out the Self-Determination Act contracts. Specifically, Congress extended the Federal Tort Claims Act to cover such claims. The FTCA is available to the same extent as it applies to the United States—without regard to whether the claimed wrong occurred within or outside the reservation. Act of November 5, 1990, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959, as amended by Act of November 11, 1993, Pub. L. No. 103-138, Title III, § 308, 107 Stat. 1416, reprinted following 25 U.S.C.S. § 450f (1995).

—protects government resources necessary for public services from loss through litigation. Such threats, while applicable to all sovereigns, have been held to be especially severe for Indian tribes whose limited resources and considerable unmet needs make them all the more vulnerable to the impact of lawsuits to which they have not consented nor planned. *Thebo v. Choctaw Tribe*, 66 F. 372, 375-76 (8th Cir. 1895); *Fidelity & Guaranty Co.*, 309 U.S. at 512-13; *Chemehuevi Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985). See also *Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, 67. The embedded conditions of poverty confronting Indian tribes¹⁸ can only be remedied by a dedicated long term commitment to their eradication. This cannot be done if tribes are subject to unlimited demands by litigants, and certainly not if they are denied the right to make their own decisions on when and how to waive their immunity—rights possessed by the federal and state governments with parallel responsibilities and much greater resources.

¹⁸ These problems persist. As recently found by Congress, "the unmet health needs of the American Indian people are severe" with the health status of Indians "far below that of the general population of the United States" Indian Health Care Improvements Act of 1976, as amended in 1992, 25 U.S.C. § 1601(d). The same is true in the areas of Indian education and employment. Considering data on school drop-out rates and levels of educational attainment, Congress found that Indian people continue to confront serious problems in education, many of which are tied to "the high incidence of poverty, unemployment, and health problems among Indian children and their families." Improving America's Schools Act of 1994, 20 U.S.C §§ 7801(4), (5), 7802(a); see also Indian Employment, Training and Related Services Demonstration Act of 1992, 25 U.S.C. § 3401. Congress has also recently found "the need for affordable homes in safe and healthy environments on Indian reservations, [and] in Indian communities" is "acute." Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(6), 110 Stat. 4018.

II. FEDERAL LAW DOES NOT PERMIT THE LOWER COURT'S TEST UNDER WHICH THE EXISTENCE OF A TRIBE'S SOVEREIGN IMMUNITY TURNS ON WHETHER SOME ASPECT OF THE TRANSACTION OCCURS ON OR OFF RESERVATION.

A. A damages action against a tribe is per se an action against the tribe on the reservation.

The operation of a tribal government cannot survive the uncertainty of a rule that would make a tribe's immunity from suit turn on whether the transaction may have occurred within or outside Indian country.¹⁹ A damages action brought against a tribe that has not consented to suit has a direct and immediate effect on the reser-

¹⁹ This Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), does not support the off-reservation distinction that the Court below made. In relying on that decision the Court below confused the rules regarding the applicability of substantive law to a tribe's off-reservation activities with the rules that control governmental immunity. The two are different. The availability of a sovereign's immunity from suit does not turn on whether the sovereign's actions were proper under substantive law. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Puerto Rico Aqueduct v. Metcalf & Eddy*, 506 U.S. 139, 145-46 (1993). Immunity is not a defense on the merits, but the right of a sovereign not to be subjected "to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe of Florida*, 517 U.S. at —, 134 L.Ed. 2d at 268 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146). The difference between the applicability of state substantive law to tribal activities occurring off-reservation and a tribe's sovereign immunity from suit is illustrated by this Court's decisions in *Citizen Band of Potawatomi* and *Santa Clara Pueblo*. Although the Court in *Potawatomi* found that the tribe was legally obligated to collect state excise taxes from its non-Indian purchasers, 498 U.S. at 512-13, the tribe's sovereign immunity from suit barred the state from asserting a counterclaim against the tribe to recover the tax. *Id.* at 509-10. The same distinction was recognized in *Santa Clara Pueblo*, where the Indian Civil Rights Act changed the substantive law applicable to Indian tribes, 436 U.S. at 57-58, but the statute did not implicitly abrogate the tribe's immunity from suit. *Id.* at 58-59.

vation and the tribe's sovereign functions. The threat to tribal sovereignty is the same whether the contract is deemed to be on- or off-reservation. This is clearly illustrated by the facts in related proceedings in this case where, at the behest of a private party, a judgment entered on a note given to an off-reservation lender has been enforced by the seizure of tribal assets off-reservation, including tribal tax revenues due from lessees of reservation property, with the tribe enjoined from enforcing its tax laws to foreclose on tax liens created by failure to pay the tax.²⁰ While the underlying claim involved a transaction denominated as off-reservation, its effects on the tribe's governmental resources and sovereignty make it the "functional equivalent" of a suit against the tribe on the reservation. See *Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 4540, 4546 (U.S. June 23, 1997); *id.* at 4548 (O'Connor, J., concurring). The practical effects of the unconsented-to litigation require that the sovereign's immunity be upheld to protect the sovereign interests. See *id.*

B. The lower Court's test would obviate the protections intended by immunity and impermissibly condition the tribe's access to off-reservation resources on a waiver of its immunity.

If the question of a tribe's sovereign immunity is to be decided by the state courts under the approach used by the courts in Oklahoma, the threat to tribal self-determination and economic self-sufficiency presented is all the more severe. Under that test, a tribe can be haled into state court by any person simply upon an allegation that some aspect of a contractual relation with the tribe is commercial and occurred outside of Indian country. As the states' laws governing the situs of contracts and business transactions do not lend themselves to a single set of rules that are uniformly applied with any pre-

²⁰ See Pet. App. at 8, 10, *Kiowa Indian Tribe of Oklahoma v. Hoover*, Civ. 98-843-C (W.D.Okla. Nov. 1996).

dictable result,²¹ any event occurring outside Indian country may be alleged as a basis for abrogating tribal immunity and subjecting the tribe to suit in state court. Whether or not there is merit to the allegation, the tribe will be compelled to appear and defend. If it does not do so, the tribe faces default judgment, followed by the likely threat of attachment of tribal funds, which for many tribes are necessarily held in banks outside the reservation. The result will be a proliferation of state court actions against Indian tribes in which even an express reservation of tribal sovereign immunity, as in this case, may be irrelevant to the analysis. And by engrafting state law rules governing situs of contracts onto a test for determining tribal immunity, the very purposes of that immunity—the sovereign's right to avoid the costs and burden of litigation—will be effectively and irrevocably lost. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The cost of defending these actions will "impose serious financial burdens on already 'financially disadvantaged' tribes," burdens that

²¹ The situs of a contract for purposes of jurisdiction and choice of law principles can turn on a variety of often competing factors, the balancing of which is left to the discretion of the court. For example, in a suit to recover on a promissory note made in connection with a purchase of securities, the situs of the claim can be affected by: the express terms of the contract, the place where it was executed, the place of payment, the location of the security interest, whether the agreement constituted a negotiable or non-negotiable instrument, and whether another sovereign has greater ties to the transaction. See *Restatement (Second) of Conflict of Laws*, §§ 6, 188, 195 (1971); Goodrich & Scoles, *Conflict of Laws*, 319-20 (4th ed. 1964). The outcome of the analysis may also turn on the cause of action pled, with differing conclusions if the suit is one to recover on the collateral, as opposed to a claim against the debtor for a judgment in damages. See *Restatement (Second) of Conflict of Laws*, §§ 56, 61, 66, 67, 68 (1971). The issues are further complicated by the need to decide whether the tribal activity at issue is commercial or governmental in nature—distinctions which, as this Court has found in other contexts, are "inherently unsound" and lead to "inevitable chaos." *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955).

many tribes can "ill afford to shoulder," *Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, and which will most certainly divert limited tribal resources from funding schools and hospitals to paying legal fees.

Moreover, the lower Court's test would accomplish what was clearly prohibited by this Court's decision in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986). The state will be able to condition a tribe's ability to obtain financing, goods, and services that are not available from any source within Indian country on a waiver of the tribe's sovereign immunity from suit and submission to rules of state law. When North Dakota attempted to do this by a state statute that conditioned the tribe's access to the state courts on a waiver of the tribe's sovereign immunity for *all* civil actions brought in the state courts and on which state civil law would control, this Court held the statute barred by federal law. As the Court found, the state's condition could be "met only at an unacceptably high price to tribal sovereignty," *id.* at 889, which was "unduly intrusive of the Tribe's common law sovereign immunity," and "a potentially severe impairment of the authority of the tribal government, its tribal courts and its laws." *Id.* at 891. The same is true here. A tribe's access to essential goods and services cannot be conditioned on a rule of law that coerces a waiver of the tribe's immunity as the price for acquiring those goods.

III. THE EXISTING FEDERAL RULES GOVERNING TRIBAL IMMUNITY PROVIDE CLEAR STANDARDS UNDER WHICH PERSONS SEEKING TO DO BUSINESS WITH INDIAN TRIBES CAN SECURE ENFORCEABLE REMEDIES.

There is no need for a radical change in the test governing tribal sovereign immunity with regard to contracts that might be said to have off-reservation attributes or effects. To the contrary, contracts are the vehicle best

suited to give effect to established federal law rules for waiver of tribal immunity.

"Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish." *McClendon v. United States*, 885 F.2d 627, 631 (9th Cir. 1989) (quoting *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985)). One who seeks to do business with an Indian tribe can negotiate the terms on which that will be done, including the terms governing remedies for breach. See *Sac & Fox Nation v. Hanson*, 47 F.3d at 1065. Provision for a waiver of sovereign immunity can be made in the text of the contract. Whether to include such provision as well as its scope lie wholly within the control of the contracting parties to be resolved in the context of negotiation. In the event that the tribe is unwilling to agree upon terms for such remedies, the other party is free to refuse to do business with the tribe. Remedies, including waivers of tribal immunity, do exist, have been agreed upon by the tribes, and enforced by the courts.²² In this case, of course,

²² See, e.g., *Sokaogon Gaming Enterprises v. Tushie Montgomery Assoc.*, 86 F.3d 656 (7th Cir. 1996) (waiver of immunity to enforce contract's arbitration clause); *Rosebud Sioux v. Val-U Const. Co.*, 50 F.3d 560, 562-63 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1997) (waiver of immunity contained in contract with off-reservation construction company); *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993), *cert. denied*, 510 U.S. 1019 (1995) (express waiver of immunity from suit contained in tribal corporation's charter, and confirmed in the contracts under which the suit was brought); *Weeks Const. Co. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (waiver of immunity in charter of tribal housing authority); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982) (tribal council adopted resolution waiving immunity from suit); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966) (waiver of immunity in tribal corporation's charter but limiting the remedies available

the Tribe expressly preserved its immunity from suit, and that governmental decision, which respondent accepted, should be respected.

The Court below is trying to protect a party who was free to avail himself of the tools that existing law provides. The Court's objective does not warrant a wholesale revision of established federal Indian law, and most certainly does not justify the test that the Oklahoma courts have applied. If there is any real need to make distinctions between a tribe's sovereign immunity with regard to activities occurring outside Indian country, that should be done by Congress pursuant to a law that will define precisely how and when it will apply.

CONCLUSION

The judgment of the Oklahoma Court of Appeals should be reversed.

Respectfully submitted,

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(11)

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1996

KIOWA TRIBE OF OKLAHOMA,

Petitioner,

vs.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

On Writ Of Certiorari To The
Oklahoma Court Of Appeals

JOINT BRIEF OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY, AND ITS WHOLLY-
OWNED CORPORATE ENTITY, LITTLE SIX, INC.;
THE SISSETON-WAHPETON SIOUX TRIBE;
THE RED LAKE BAND OF CHIPPEWA; AND
THE GRAND PORTAGE BAND OF CHIPPEWA AS
AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

The Shakopee Mdewakanton Sioux (Dakota) Community ("SMS(D)C"), the Sisseton-Wahpeton Sioux Tribe, the Red Lake Band of Chippewa, and the Grand Portage Band of Chippewa are federally-recognized Indian tribes, exercising inherent powers of self-government. Little Six, Inc. is a wholly-owned tribal corporation, and the instrumentality through which the SMS(D)C operates its gaming activities pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*

Amici represent a broad range of non-profit and commercial tribal interests, from the struggling Sisseton-Wahpeton Community College, the primary source of higher education for its Tribe's members, to the SMS(D)C's successful Mystic Lake Hotel and Casino. Each of the tribes inhabits a relatively small reservation, and their continued self-governance depends heavily on commercial interaction with non-Indians off of trust lands. Affirmance of the Oklahoma Court of Appeals' decision may directly affect the ultimate disposition of the Minnesota Supreme Court's contrary opinion in *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996), *cert. pet. pending*, No. 96-1215 (filed Jan. 29, 1997). Thus, *Amici* strongly support Petitioner, the Kiowa Tribe of Oklahoma. Both parties have consented to this submission.

SUMMARY OF ARGUMENT

The Court should not, at this late date, struggle to equate Indian tribes with foreign governments. Indian

*Counsel for neither party authored this brief, in whole or in part. No entity, other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. S.Ct. Rule 37.6.

tribes are "domestic Nations," and their sovereign immunity has been defined accordingly. Tribes are uniquely vulnerable within the boundaries of at least one state, and cannot isolate their commercial transactions with the freedom of foreign sovereigns. Indeed, it has been the policy of the Congress, and the inevitable result of this Court's precedent, to encourage tribal and state interaction. In light of the tribes' unique *domestic* sovereign status, the federal government has assumed vital responsibilities of protection and trust. If tribal immunity is to be limited, the federal trust responsibility demands that all of the relevant policy concerns must be addressed in the process. Only Congress and the tribes themselves can limit tribal sovereign immunity with such specificity. But, even if this case were reduced to a simple matter of contract, both the respondent *and the State of Oklahoma* agreed to a result contrary to the arguments they now assert.

I. TRIBAL SOVEREIGN IMMUNITY IS UNIQUE.

"The condition of the Indians in relation to the United States is perhaps unlike that of any two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 22 (1831). Tribes are neither states nor foreign governments. *Id.* at 17-22. Thus, to paraphrase this Court's admonition, "the differences in the form and nature of their sovereignty make it treacherous to import to one notions of [sovereign immunity] that are properly applied to the other[s]." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). This Court's analysis must reflect the unique dichotomy of tribes as "domestic Nations." *Cf. Arizona v.*

California, 373 U.S. 546, 597 (1963) (recognizing that application to tribe of doctrine developed for states is inappropriate in light of federal role in Indian affairs).

A. Tribal sovereign immunity shares attributes of foreign immunity.

In *Idaho v. Coeur d'Alene Tribe*, a majority of the Court cited an earlier opinion, in which the Court noted that "Indian tribes . . . should be accorded the same status as foreign sovereigns." — U.S. —, 117 S.Ct. 2028, 2033 (1997), citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). The Court cited this conclusion, *quid pro quo*, as support for the proposition that states did not surrender their inherent immunity for the benefit of tribes "in the plan of the convention." Clearly, tribal immunity shares this attribute with foreign immunity. Indian tribes did not participate in developing the federal system; they saw the federal system imposed around them. Therefore, they did not sacrifice their sovereign immunity in the process.

Tribal immunity pre-existed both the state and federal governments. It was not conferred by the United States. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Immunity from suit is an inherent attribute of Indian tribes that remains "theirs as sovereigns." *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). Thus, tribal immunity was *recognized*, not bestowed, by all of the United States through the federal government in its plenary role over Indian affairs.

B. But, direct analogies to foreign sovereigns do not address the unique situation of the tribes in the federal system. Indian tribal immunity is also "similar to that of the United States."

As has been held numerous times to their consistent detriment, Indian tribes are not foreign governments. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); *Cherokee Nation*, 30 U.S. at 17; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978). They cannot disassociate themselves entirely from the United States. Likewise, the United States cannot disassociate themselves from the tribes, unless Congress declares its intent explicitly. See, e.g., *Menominee Tribe v. United States*, 388 F.2d 998, 1001 (Ct. Cl. 1967), *aff'd*, 391 U.S. 404 (1968). The immunity that tribes enjoyed as an inherent attribute of isolated tribal sovereignty is now inextricably secured in the tribes' unique relationship with the United States.

1. Tribes are uniquely vulnerable.

In *Nevada v. Hall*, the Court implied that a truly foreign sovereign can avoid the assumption of jurisdiction by withdrawing its money from the banks of the sovereign asserting jurisdiction, and by refusing to recognize the foreign judgment in its own courts. 440 U.S. 410, 417 n.12 (1979). Tribes cannot invoke these protections, however. They have neither the luxury of isolating their commercial transactions to tribal lands, nor the absolute freedom to simply ignore state courts.

Indian tribes are uniquely situated within at least one state. Congress has recognized that tribal governments are constrained by limited reservation resources, and has

provided for Indians and tribes to interact commercially with non-Indians, both on and off trust lands.¹ If, in order to rely on the necessary protections of sovereign immunity, tribes were required to buy from, advertise to, sell to, serve, bank with, and hire only tribal members in Indian country, tribal self-government would cease to exist. Tribes could not, secure in their sovereign status, hire accountants or attorneys with offices off of trust land. Advertisements in newspapers of general circulation would be cited as support for the assumption of state court jurisdiction. Tribes simply could not continue to develop their new economies if every discrete aspect of their commerce were confined to trust lands.²

Furthermore, as this case has shown, tribes cannot simply ignore state court judgments. Most tribes likely have debtors that are subject to intervening state court processes. Even if they do not, state courts might simply invoke their state's dominant police power to enforce their orders, regardless of legitimate tribal protests. See

¹ See, e.g., 25 U.S.C. § 305(a) (citing "expansion of the market" as primary duty of the federal Indian Arts & Crafts Board); 25 U.S.C. § 81 (establishing requirements for contracts with Indians); 25 U.S.C. § 2710(b)(2)(d) (contemplating audits of "contracts for supplies, services, or concessions" with regard to Indian gaming); 25 U.S.C. § 2711 (providing for federal approval of contracts between Indian tribes and gaming management companies).

² This Court has never attempted to scrutinize the situs of every aspect of Indian commerce when recognizing tribal immunity. See F. Cohen, *Handbook of Federal Indian Law* 349 n.7 (1982 ed.) ("[T]he only [immunity] case in which the events were confined completely to Indian country was *Turner v. United States*, 248 U.S. 354 (1919).").

Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma, 68 Okla. Bar Journal 1649 (May 10, 1997) (enforcing seizure by creditor's bill of Kiowa Tribe's oil and gas severance tax and issuing injunction prohibiting the Tribe from enforcing its tax lien law).³

Moreover, relying in part on their immunity from suit, many tribes have entered into, or are considering full faith and credit agreements with the states. *See, e.g.*, 12 Okla. Stat. § 2, rule 30 (district court rule providing for reciprocal tribal/state full faith and credit agreements); S.D. Codified Law § 1-1-25 (same). Unless tribes are willing to abrogate these agreements unilaterally, tribal courts may have no choice but to recognize and execute state court judgments (by seizing tribal assets). Foreign governments are not bound by such interdependent relationships.

2. The federal government has accepted the responsibilities of guardianship, with the consent of the states.

When the Constitution was drafted, tribal resources were more abundant and less easily plundered than they are today. Tribes were powerful sovereigns that demanded unified federal attention. *Cherokee Nation* at 18 ("At the time the Constitution was framed, . . . [the Indians'] appeal was to the tomahawk, or to the

³ It is beyond imagination how the Oklahoma Supreme Court can claim that its seizure of tribal tax revenue and its injunction of tribal law do not infringe on tribal self-government. One can hardly imagine more direct infringements short of complete termination.

[National] government."). Thus, Indian relations were made the exclusive province of Congress. U.S. Const. art. 1, § 8, cl. 3. As the balance of power gradually shifted in favor of states as a result of tribal concessions to the federal government, the federal trust protection engaged accordingly. *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("From [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises a duty of protection"). In exchange for the countless cessions that left tribes prostrate in the middle of states, the federal government assumed vital responsibilities of protection and trust.⁴

The federal trust responsibility requires that the United States, as fiduciary, act in the best interests of the tribes, as beneficiaries, to promote tribal self-government, protect tribal lands and people, and preserve tribal sovereignty in the absence of conflicting federal policy. Thus, as

⁴ *See Handbook of Federal Indian Law* at 60. "On October 22, 1784, the commissioners [appointed by the Continental Congress] concluded a treaty with the hostile tribes of the Six Nations at Fort Stanwix. Provisions of the treaty helped shape the character of Indian relations. In the first paragraph the United States received the Indian tribes 'into their protection.' This language has been cited as a source of the federal government's obligation to Indian tribes as dependent wards." The origin of this Court's recognition of the trust responsibility is found in the "Cherokee cases": *Cherokee Nation* and *Worcester v. Georgia*, 31 U.S. 515 (1832). *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379-80 (1st Cir. 1975).

a practical matter, the trust doctrine often serves to protect tribes against incursions by the states. *Kagama*, 118 U.S. at 383-84 ("These Indian Tribes are the wards of the Nation. . . . They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies."); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-69 (1973); *Williams v. Lee*, 358 U.S. 217, 218 (1959); *State of Washington, Dept. of Ecology v. United States E.P.A.*, 752 F.2d 1465, 1470 (9th Cir. 1985) (recognizing that the trust responsibility "arose largely from the federal role as a guarantor of Indian rights against state encroachment").

3. Tribal immunity is inextricably bound to the sovereign immunity of the United States.

In light of the tribes' unique vulnerability and the obligations of the federal government as guardian, this Court has defined the tribes' sovereign immunity "as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *United States Fid. & Guar. Co.* at 512. As Felix Cohen's authoritative *Handbook* notes, "the Supreme Court has held that Indian tribes enjoy sovereign immunity from suit similar to that of the United States." *Handbook of Federal Indian Law* at 324; see also *Ramey Const. Co. v. Apache Tribe*, 673 F.2d 315, 319 (10th Cir. 1982) ("The Indian Tribes' sovereign immunity is co-extensive with

that of the United States.").⁵ This implied infusion of federal protection is an appropriate and necessary result of the precarious situation of Indian tribes within the states. Cf. *Minnesota v. United States*, 305 U.S. 382, 386-87 (1939) (recognizing that the United States is a necessary party in suit by state to condemn Indian lands, and is immune from suit).

Because it is permeated with the immunity of the United States itself, then, tribal sovereign immunity has an "extra-territorial" aspect. Tribes, like the United States, are "domestic Nations"; they cannot isolate themselves from the individual states. Thus, "the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority." *United States Fid. & Guar. Co.*, 309 U.S. at 514 (emphasis added); see also *Kansas v. United States*, 204 U.S. 331, 341 (1907) (acknowledging that not even a state can sue the United States without its consent). This Court has consistently recognized that tribal immunity, like the

⁵ *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982) (recognizing that tribal sovereign immunity "is generally co-extensive with that of the United States"); *Sekaquaptewa v. MacDonald*, 619 F.2d 801, 808 (9th Cir. 1980) ("The United States and Indian tribes . . . possess coextensive sovereign immunity."), cert. denied, 449 U.S. 1010 (1980); *Hamilton v. Nakai*, 453 F.2d 152, 158 (9th Cir. 1972) (same), cert. denied, 406 U.S. 945 (1972); *Namekagon Dev. Co. v. Bois Forte Reservation Housing Auth.*, 517 F.2d 508, 510 (8th Cir. 1975) ("Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government."); *Maynard v. Narragansett Tribe*, 798 F. Supp. 94, 97 (D.R.I. 1992) ("Bringing suit against the Tribe mimics an action against the United States government.").

immunity of the United States, cannot be ignored by simply withholding comity. *Id.*

In *Nevada*, the Court conceded that state recognition of truly foreign sovereign immunity may be mandated, not as a matter of comity, but as a matter of right, by "protection [that] is conferred by the United States Constitution." 440 U.S. at 417 n.12. The federal trust responsibility is such a protection, which derives from the unique constitutional relationship of tribes and the state and federal governments.⁶

Furthermore, immunity from suit is an inherent aspect of tribal self-government. *Santa Clara Pueblo*, 436 U.S. at 58. "The reservation of tribal self-government free of state jurisdiction was initially derived by implication from treaties." *Handbook of Federal Indian Law* at 222. The federal treaty relationship, which preserves tribal self-government, is the supreme law of the land. It supersedes any inconsistent state constitutional provision, *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880), including the one that confers jurisdictional authority on the Oklahoma courts – as those courts have defined it. Notwithstanding the Oklahoma Supreme Court's statement that it is not bound by the holding announced in *Sac & Fox Nation v. Hanson*,

⁶ The Court in *Nevada* also conceded that an agreement may be "implied . . . between two sovereigns," which would foreclose the option of ignoring immunity. 440 U.S. at 416. Concessions by the states to the federal government, on the tribes' behalf, can be implied from the terms of the Indian Commerce Clause, the Treaty Clause, and, often, from the very documents that provided for statehood. See discussion *infra* at II.

47 F.3d 1061 (10th Cir. 1995), the court is bound by supreme federal law.

C. At the very least, the federal trust responsibility demands that only Congress can limit the scope of inherent tribal immunity, with due regard to the relevant policy interests.

State and federal governments have had over 200 years to develop their economies and assess the relative usefulness of their various immunities. Yet, only recently have they begun to limit sovereign immunity to certain causes of action and certain remedies. For example, only in 1976 did the State of Minnesota refine its immunity by virtue of the Minnesota Tort Claims Act, Minn. Stat. § 3.736. Are states to enjoy the advantage of a few centuries of economic growth shielded by absolute immunity, while tribes fight every step of the way for only a few years of such protection? Clearly, this is a question of federal Indian policy, that only Congress can answer. *Oklahoma Tax Comm. v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 510 (1991) ("Congress has always been at liberty to dispense with such immunity or to limit it."); *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992) ("Congress knows how to limit the sovereign immunity of others when it wants to.").

The United States Constitution clearly operates to divest states of authority to diminish tribal sovereignty, including tribal immunity from suit. *Seminole Tribe of Florida v. Florida*, 517 U.S. ___, 116 S.Ct. 1114, 1126, 134 L.Ed.2d 252, 270 (1996) (recognizing that the states "have

been divested of virtually all authority over Indian commerce and Indian tribes"). As discussed *supra*, the sovereignty of Indian tribes is not a matter of state law, and tribal immunities are protected from diminution by the states. *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng., P.C.*, 476 U.S. 877, 891 (1986). The conclusions of the Oklahoma Supreme Court in its recent line of cases should be recognized for what they are – waivers by implication and affronts to this Court's precedent. State abrogation of tribal immunities presumes more authority than the United States Constitution will support.

Tribal immunities cannot be diminished or abrogated simply because a tribe does business primarily within the boundaries of Oklahoma or New Mexico (the only state courts to treat tribal sovereign immunity as an issue of state law). Because tribal immunities are the exclusive province of Congress, the state in which a tribe transacts business should have no bearing on whether a tribe is protected by sovereign immunity. Virtually all state supreme courts addressing this issue have held that tribes are protected by sovereign immunity for commercial activities occurring outside Indian country.⁷ The Kiowa

⁷ *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *North Sea Prod., Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979); *Robles v. Shoshone-Bannock Tribes*, 867 P.2d 134 (Idaho 1994); *In re Ransom v. St. Regis Mohawk Educ. & Comm. Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996), *cert. pet. pending*, No. 96-1215 (filed Jan. 29, 1997). Even the New Mexico courts have signalled that they are prepared to re-examine the validity of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). See *Defeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. Ct. App. 1995).

Tribe must be treated accordingly as a matter of plenary federal policy. *Williams*, 358 U.S. at 219 n.4 ("The Federal Government's power over Indians is derived . . . from the necessity of giving uniform protection to a dependent people.").

Not even federal courts can abrogate tribal sovereign immunity with the specificity demanded by the federal trust responsibility. The jurisdiction of federal courts is not co-extensive with the authority of Congress to limit tribal immunities. U.S. Const. art. 1, § 8, cl. 3. Because the Constitution grants to Congress singular power to diminish or abrogate tribal immunities, this Court has been hesitant to act in the absence of clear congressional expressions of intent, recognizing that "until Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). "Because tribes retain all inherent aspects of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982). Further, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [the Court] tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60.

This approach is consistent with this Court's treatment of sovereign immunity generally. The Court has always taken its direction regarding the extent of immunity afforded a sovereign from the executive and legislative branches of the United States government. *Mexico v. Hoffman*, 324 U.S. 30, 35 (1943) ("It is . . . not for the courts to deny an immunity which our government has seen fit

to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). Here, federal policy from both the executive and the legislative branches is consistent. As discussed, the policy of the federal government is to acknowledge tribal sovereign immunity, without limitations as to territory, transaction, or harm alleged.

The courts can only eliminate tribal immunity wholesale; they cannot balance the relevant policy considerations and, for example, assign damage limits.⁸ They cannot designate the appropriate forums to hear claims against the government.⁹ They cannot structure waivers to suit specific causes of action,¹⁰ or establish statutes of limitations.¹¹ Nor can they weigh the relative merits of maintaining immunity for governmental conduct versus purely commercial activity.¹² In other words, only Congress and the tribes themselves can limit tribal immunity with the specificity required by the federal trust responsibility.

⁸ Compare Shakopee Mdewakanton Sioux (Dakota) Community Tort Claim Ordinance § 5 (liability shall not exceed \$250,000 per claim or \$1,000,000 for multiple claims) (App. 1).

⁹ Compare *Id.* at § 4(a).

¹⁰ Compare Minn. Stat. § 3.736 (tort claims) and Minn. Stat. § 751 (1997) (contract claims).

¹¹ Compare Minn. Stat. § 3.736(11).

¹² Compare Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605(2).

II. THE OKLAHOMA COURTS ARE ESTOPPED, AS A MATTER OF AFFIRMATIVE FEDERAL AND STATE LAW, FROM CONSTRUING THEIR JURISDICTIONAL AUTHORITY TO EXTEND TO SUITS AGAINST INDIAN TRIBES.

All state courts are bound to recognize Indian tribes' broad sovereign immunity from suit, which extends to bar suits arising from conduct occurring outside of Indian country. But Oklahoma's recent assumption of jurisdiction is *particularly* egregious when viewed in the context of Oklahoma statehood and the unique concessions made to accommodate pre-existing tribal sovereignty.

A. Tribal sovereign immunity from suit in any court was recognized in Indian Territory before Oklahoma statehood.

It was understood well before Oklahoma statehood that Indian tribes in the Indian and Oklahoma Territories were immune from suit in any court absent express waiver or abrogation. In 1895, in fact, the Eighth Circuit Court of Appeals recognized that the federal court in Indian Territory did not have jurisdiction to hear a contract claim against the Choctaw Tribe. *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (8th Cir. 1895). In *Thebo*, a non-Indian attempted to sue the Tribe to recover past-due attorney's fees. Upon review of the local federal court's dismissal, the Eighth Circuit recognized that the Choctaw Nation retained attributes of sovereignty, including immunity from suit "in its own courts or any other." *Id.* at 375 (emphasis added), citing *Beers v. Arkansas*, 20 How. 527, 5 L.Ed. 991 (1858); see also *In re Greene*, 980 F.2d at 595

(recognizing that it was well understood in the 1800s that sovereign immunity had an extra-territorial component).

The court acknowledged that Congress could, if it so chose, limit or abolish the Tribe's immunity, but it had not done so. *Id.* at 375-76. The court found that "[i]t has been the settled policy of congress not to sanction suits generally against these Indian Nations, or subject them to suits upon contracts or other causes of action at the instance of private parties." *Id.* at 376. Further, "[t]he intention of congress [sic] to confer such a jurisdiction upon *any* court would have to be expressed in plain and unambiguous terms." *Id.* (emphasis added).¹³

The Eighth Circuit's sound reasoning has survived to the present day, but it was particularly resonant in what is now Oklahoma, before and directly after statehood. It was very clear that jurisdiction over tribes could not be assumed by *any* court, but had to be conferred explicitly. It is with this clear understanding that Oklahoma joined the Union as a state in 1907.

¹³ This reasoning also informed the Eighth Circuit's decision in *Adams v. Murphy*, in which the court recognized that the Creek Nation was "exempt from civil suit to compel performance of its contracts or to recover damages for their violation." 165 F. 304, 308 (8th Cir. 1908), citing *Thebo*, 66 F. at 375. The court reversed the contrary decrees of the courts of Indian Territory, and "remanded [the cause] to the Supreme Court of the State of Oklahoma [established during the pendency of the action] for further proceedings not inconsistent with this opinion." *Id.* at 312. There is no apparent publication of the Oklahoma Supreme Court's disposition of the matter, surely its first with regard to tribal sovereign immunity, but it is clear that the court was made aware of the state of the law, if it had not been so already.

B. The Oklahoma Enabling Act expressly provides that nothing in the Oklahoma Constitution can be construed to affect tribal sovereign rights without tribal or congressional consent.

The Oklahoma Enabling Act expressly preserves the sovereign rights of tribes within the new state's borders, unless and until such sovereignty is extinguished:

That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma as hereinafter provided. *Provided*, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished). . . .

Act of June 16, 1906, 34 Stat. 267, § 1. Delegates to the state constitutional convention adopted a binding ordinance, irrevocably accepting the terms and conditions of the enabling act. *Coyle v. Smith*, 221 U.S. 559, 564-65 (1911). Thus, as a matter of both federal and state law,¹⁴ state courts cannot assume jurisdiction over tribes by fiat; they must first cite an affirmative congressional abrogation or an express tribal waiver of immunity.

¹⁴ The state law effect of the state's irrevocable acceptance of the terms and conditions of the enabling act is, of course, a question for the state courts. But, the effect of the act as an affirmative *federal* law is properly addressed by this Court. See *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 712 n.2 (10th Cir. 1989).

The Oklahoma Enabling Act is an affirmative congressional recitation of the "reserved rights doctrine" developed by this Court. *See, e.g., United States v. Winans*, 198 U.S. 371, 381 (1905). It preserves the sovereign status of all Oklahoma tribes, as such sovereignty existed in 1906. By 1906, the courts had recognized that Indian tribes were immune from suit in *any* court without explicit congressional authorization. *Thebo* at 375. Like the State of Kansas, whose enabling act shares a similar provision, Oklahoma "accepted this status when she accepted the act admitting her to the Union." *Blue Jacket v. Bd. of Comm'rs*, 5 Wall. 737, 757; 18 L.Ed. 667, 673 (1867).¹⁵ Oklahoma is bound, not only by this Court's precedent regarding tribal sovereign immunity, but also by the terms of its enabling act to recognize the Kiowa Tribe's immunity, unless and until Congress directs otherwise. *See also Ex Parte Webb*, 225 U.S. 663, 683 (1912) ("It is clear that in framing the [Oklahoma] enabling act, Congress was mindful . . . of its jurisdiction over commerce with the Indian tribes."); *Indian Country U.S.A. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 978-980 (10th Cir. 1987) (citing § 1 of the Oklahoma Enabling Act as a general reservation of federal and tribal jurisdiction over Indians), *cert. denied*, 487 U.S. 1218 (1988).

¹⁵ In *Blue Jacket*, this Court recognized that "[t]here [was] no question of state sovereignty in the case as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them. . . ." 5 Wall. at 756; 18 L.Ed. at 672; *Cf. Ward v. Race Horse*, 163 U.S. 504, 515 (1896).

Twelve western states with large Indian populations share similar accommodations in their enabling, organic, or statehood acts.¹⁶ Perhaps the most conclusive evidence of the preclusive effect of these provisions is the fact that Congress had to create a *specific* exemption in the original version of Public Law 280, so that states could assume jurisdiction under that act. Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 590, *codified at* 25 U.S.C. § 1324. The act allows states to assume jurisdiction under certain circumstances, "notwithstanding the provisions of any enabling Act for the admission of a state." *Id.* In the present case, not only are the Oklahoma courts assuming jurisdiction on their own without direction from Congress, they are doing so despite the clear prohibition in their state's enabling act, which requires a specific *congressional* waiver. *See also McClanahan*, 411 U.S. at 178 (recognizing that Congress would not have imposed requirements in P.L. 280 that states must meet in order to overcome the effect of the enabling acts "if the States were free to accomplish the same goal unilaterally . . .").

Oklahoma courts derive their jurisdictional authority from the Oklahoma Constitution, as expressly limited by its own terms and by the Oklahoma Enabling Act. Okla. Const. art. VII, § 4. The enabling act, as affirmative federal and state law, mandates that nothing in the Oklahoma Constitution can be construed to limit tribal

¹⁶ North Dakota, South Dakota, Montana, Washington, Utah, Arizona, New Mexico, Alaska, Idaho, Wyoming, Kansas, and Oklahoma. *See* F. Cohen, *Handbook of Federal Indian Law* 368 n.174 (1982 ed.).

sovereignty. Yet, the courts now construe their constitutional authority to annul the Tribe's sovereign immunity, without citing to any abrogation or waiver. The jurisdiction of the Oklahoma Supreme Court is "co-extensive with the state," Okla. Const., art. VII, § 4, but cannot exceed the jurisdictional limitations of pre-existing tribal sovereignty and supreme federal law. It is a myopic view of history that permits the state courts to assume by fiat that which they never hoped to have without express tribal or congressional authorization.¹⁷

The State of Oklahoma owes its very existence to a series of congressional abrogations of express treaty promises to several Indian tribes.¹⁸ Nowhere among these

¹⁷ Unlike some congressional mandates for new states, section one of the Oklahoma Enabling Act concerns an aspect of plenary federal control, Indian commerce, not merely an internal state matter. *Compare Coyle*, 221 U.S. at 574. In *Coyle*, the Court drew a clear distinction between matters of independent federal authority, such as Indian relations, and purely internal state concerns. *Id.* ("It may well be that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce . . . with the Indian tribes."). In fact, the Court specifically distinguished the provision in the Kansas Enabling Act held to restrict the state's assumption of jurisdiction over the tribe in *Blue Jacket*. *Id.* at 578-79. Obviously, "equal footing" does not equate to absolute jurisdiction. States are still bound by jurisdictional limitations that flow from express accommodations, pre-existing tribal sovereignty, and supreme federal law. *Arizona*, 373 U.S. at 597-98 (1963). Furthermore, section one is not a disclaimer of jurisdiction over tribal lands, in which the state may argue it holds all but a proprietary interest. *Compare Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962).

¹⁸ See, e.g., Treaty with the Cherokees of Dec. 29, 1835, art. 5, 7 Stat. 478, 481 ("[T]he lands ceded to the Cherokee Nation in

abrogations is there a waiver, express or otherwise, of the Kiowa Tribe's inherent sovereign immunity from suit. When Oklahoma entered the Union in 1907, it did so under unique constraints of accommodation to the numerous tribes that had occupied the area decades and centuries before. Congress could have, but has not terminated the United States' relationship with the Kiowa Tribe. 61 Fed. Reg. 58213 (1996) (official notice recognizing the "Kiowa Indian Tribe of Oklahoma"). As a corollary, Congress could have, but has not cleared the way for the unrestrained exercise of jurisdiction that the Oklahoma courts claim today. It could have limited the scope of the Tribe's broad immunity, conferring jurisdiction on the state courts when the contract at issue is consummated outside of Indian country. Neither the state courts, nor Respondent can cite to any such limitation, however, as none exists.

CONCLUSION

This case reflects a state's assumption, through its judiciary, of a role reserved to Congress in the federal Constitution. Tribal economies across the country exist at various stages of infancy. Sovereign immunity has been

the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory"); Treaty with the Ottoways, Aug. 30, 1831, art. 9, 7 Stat. 359, 361 (same); Treaty with the Shawnees, Aug. 8, 1831, art. 10, 7 Stat. 355, 357 (same); Treaty with the Choctaws, Sept. 27, 1830, art. 4, 7 Stat. 333 (same); see also *Angie Debo, And Still the Waters Run* (1940).

an essential element of Congress' recent Indian policy. *Citizen Band Potawatomi Tribe*, 498 U.S. at 510. The Oklahoma courts have apparently determined that they have no stake in tribal self-sufficiency and have eliminated this valuable protection altogether, but only for tribes doing business in Oklahoma. Now, this Court is called upon to do the same for all tribes that cannot confine their fledgling enterprises to trust lands. To do so, however, is to ignore constraints imposed on all courts, and to deny Congress' interests and obligations altogether.

Even if this case were reduced to a simple matter of contract, both the respondent and the State of Oklahoma agreed to a contrary result. The promissory note on which the respondent bases its claim expressly preserves the sovereign rights of the Tribe. Likewise, the Oklahoma Enabling Act expressly limits the jurisdictional authority of the state courts.

For the foregoing reasons, the decision of the Oklahoma Court of Appeals should be reversed.

Respectfully submitted,

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Stanley R. Crooks
Chairman

Glynn A. Crooks
Vice Chairman

Susan Totenhagen
Secretary/Treasurer

**RESOLUTION NO. 11-12-96-001
ENACTMENT OF TORT CLAIMS ORDINANCE**

WHEREAS, the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community is the governing body of the Community; and

WHEREAS, the General Council is empowered through Article V, Section 1(e) of the Constitution to manage the economic affairs of the Community; and

WHEREAS, the General Council is empowered through Article V, Section (h) of the Constitution to promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety and general welfare of the Community; and

WHEREAS, the General Council has considered the need for a means to address tort claims brought against the Community or its entities; and

App. 2

WHEREAS, the General Council is aware of the need to provide those persons and organizations that do business with or are guests of the Community and the Community's entities and instrumentalities with a forum for redress of their legitimate claims which may otherwise be barred due to the Shakopee Mdewakanton Sioux (Dakota) Community's sovereign immunity from suit; and

WHEREAS, the General Council has determined that the Community's insurers should pay compensation for damages suffered due to injury to or loss of property, or personal injury or death, where such losses or damages are caused by an act or omission of an employee of the Community while functioning within the scope of the duties of that person's office or employment, under those circumstances where the Community, if a private person, would be liable to the claimant.

NOW THEREFORE BE IT RESOLVED, that the Shakopee Mdewakanton Sioux (Dakota) Community hereby approves and adopts for enactment the attached Shakopee Mdewakanton Sioux (Dakota) Community Tort Claims Ordinance (the "Ordinance"), and directs that the same be forwarded to the Secretary of the Interior or his delegate for approval pursuant to the Constitution of the Community.

BE IT FURTHER RESOLVED, that the Shakopee Mdewakanton Sioux (Dakota) Community hereby waives its sovereign immunity from suit for the limited purpose

App. 3

of permitting claims made against the Community pursuant to the Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided for in Section 5 of the Ordinance, provided the damages are payable from the proceeds of an insurance policy.

/s/ Joe Brewer /s/ Danny Crooks
Moved by Seconded by

/s/ Stanley R. Crooks /s/ Glynn Crooks
Stanley R. Crooks, Glynn Crooks, Vice-Chairman
Chairman

/s/ Susan Totenhagen
Susan Totenhagen,
Secretary Treasurer

CERTIFICATION

Regular General Council Meeting of November 12, 1996

This Resolution No. 11-12-96-001 was presented to the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community at a Regular General Council meeting held on November 12, 1996. There are 111 eligible voters pursuant to the voting list certified and posted by the Secretary/Treasurer on Sept. 11, 1996.

To the best of my knowledge and belief, the results reported herein accurately reflect the vote of the General Council at the meeting on November 12, 1996.

App. 4

The Vote on Resolution No. 11-12-96-001 was:

38 For, 0 Against, 0 Spoiled, 2 Abstentions; and 1 Chair not voting

X Passed Failed

/s/ Joe Brewer
Moved by

/s/ Danny Crooks
Seconded by

/s/ Stanley R. Crooks
Stanley R. Crooks,
Chairman

/s/ Glynn Crooks
Glynn Crooks, Vice-Chairman

/s/ Susan Totenhagen
Susan Totenhagen,
Secretary/Treasurer

/s/ Randolph J. Schacht
Randolph J. Schacht,
Election Commissioner

App. 5

**SHAKOPEE MDEWAKANTON SIOUX (DAKOTA)
COMMUNITY TORT CLAIMS ORDINANCE**

Section 1. Policy

It is the policy of the Shakopee Mdewakanton Sioux (Dakota) Community in the enactment of this Ordinance to exercise its retained inherent sovereignty to implement Community governmental powers, which powers are hereby declared by the Community to be of the same nature as all other Community sovereign powers, and which may be exercised by the Community pursuant to the provisions of the Shakopee Mdewakanton Sioux (Dakota) Community Constitution.

- 1.02. *Constitutional Authority.* The Constitution of the Shakopee Mdewakanton Sioux (Dakota) Community, Article V provides for the exercise of legislative powers by the Community acting through the General Council to further the economic advancement of the Shakopee Mdewakanton Sioux (Dakota) people. More specifically, this Ordinance is enacted by the Shakopee Mdewakanton Sioux (Dakota) Community General Council under the authority vested in said General Council by Section 1, Subsections (e), (h) and (l) of Article V of the Constitution of the Shakopee Mdewakanton Sioux (Dakota) Community as amended. The General Council reserves the right to repeal or amend the provisions of this Ordinance as necessary.

Section 2. Purpose

The Shakopee Mdewakanton Sioux (Dakota) Community enacts this Tort Claims Ordinance in order to provide those persons and organizations that do business with or

are guests of the Community and the Community's entities and instrumentalities with a forum for redress of their legitimate claims which may otherwise be barred due to the Shakopee Mdewakanton Sioux (Dakota) Community's sovereign immunity from suit. Therefore, the Community will pay compensation for damages suffered due to injury to or loss of property, or personal injury or death, where such losses or damages are caused by an act or omission of an employee of the Community while functioning within the scope of the duties of that person's office or employment, under those circumstances where the Community, if a private person, would be liable to the claimant.

Section 3. Definitions

(A) *Shakopee Mdewakanton Sioux (Dakota) Community* means the Community and all subentities thereof, whether governmental or commercial in nature, including, without limitation, the General Council, the Business Council, any committee or agency thereof, any corporate entity, the Tribal Court, and any other entity commissioned or created by the General Council (hereinafter collectively referred to as the "Community", unless noted otherwise), or by the Business Council.

(B) *Employee of the Community* means all elected officials, all officers, and all other persons employed by the Community.

(C) *Acting within the scope of office or employment* means execution by any employee of the Community of the duties, responsibilities, authorities, powers and functions

of employees in that person's position, whether acting in a governmental, business, professional, or other capacity.

Section 4. Waiver of Sovereign Immunity, Liability of the Community

(A) The Community hereby expressly waives its sovereign immunity from suit for the limited purpose of permitting claims made against the Community pursuant to this Ordinance to be brought in Tribal Court, and to permit damages to be awarded against the Community to the extent provided for in Section 5 herein, provided the damages are payable from the proceeds of an insurance policy. The Community will pay, from the proceeds of an insurance policy, compensation for injury to or loss of property, or for personal injury or death, caused by an act or omission of an employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant.

(B) The limited waiver of the Community's sovereign immunity from suit provided in paragraph A of this Section shall not extend to cases filed pursuant to this Ordinance in any jurisdiction other than the Shakopee Mdewakanton Sioux (Dakota) Tribal Court. The Community expressly retains its sovereign immunity from suit for all claims brought in all federal, state, and other tribal courts and in any federal, state, and tribal agency or administrative body. The Community further expressly retains its sovereign immunity from suit for those causes of action which are not covered by an insurance policy. Nothing contained herein shall prohibit the Community

from waiving its sovereign immunity to permit claims in excess of the amounts identified in Section 5 hereof, or to permit claims accruing prior to the date of this Ordinance, but only if such claims are heard in the Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court.

(C) The remedies against the Community provided by this Ordinance, whether for damages or injury to or loss of property, or for damages awarded to compensate for personal injury or death caused by an act or omission of an employee of the Community while acting within the scope of office or employment, is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter, whether the claim is made against the employee whose act or omission gave rise to the claim, against the estate of such employee, or against the Community as the employer of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the Community, the employee or the employee's estate is precluded without regard to when the act or omission occurred. Double recovery is prohibited.

Section 5. Limits

The liability of the Community provided in Section 4 of this Ordinance shall not exceed two hundred fifty thousand dollars (\$250,000) per claim, or one million dollars (\$1,000,000) for multiple claims arising out of a single event or occurrence, exclusive of interest accruing prior to judgment, or punitive damages. The Community

retains the right, where limited circumstances may warrant, to waive its sovereign immunity for claims of a higher amount.

Section 6. Jurisdiction

The Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall have original and exclusive jurisdiction to hear claims brought pursuant to this Ordinance, subject to the terms of the Ordinance, and all claims not brought in the Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall be deemed invalid.

Section 7. Exclusions

Without intent to preclude the Shakopee Mdewakanton Sioux (Dakota) Tribal Court from finding additional cases where the Community and its employees should not, in equity and good conscience, pay compensation for injury to or loss of property, or for personal injury or death, the Community and its employees are not liable for the following losses:

- (A) a loss caused by an act or omission of a Community employee exercising due care in the execution of a valid or invalid statute, rule, ordinance or resolution;
- (B) a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused;
- (C) a loss in connection with the assessment and collection of taxes;

- (D) a loss other than one sustained from injury to or loss of property, or from personal injury or death; and
- (E) a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the Community, its employees or agents.

Section 8. Defenses

With respect to any claim under this Ordinance, the Community hereby expressly retains its sovereign immunity from suit except as such sovereign immunity would be inconsistent with the provisions of this Ordinance. The Community shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the Community whose act or omission gave rise to the claim, as well as any other defenses to which the Community is entitled.

Section 9. Statute of Limitations

The statute of limitations for all claims brought against the Community is two (2) years and the right to bring a claim against the Community shall begin to accrue on the date of the act or omission giving rise to the claim, or on the date a reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community.

Section 10. Procedure

(A) An action shall not be instituted upon a claim against the Community for injury to or loss of property, or for personal injury or death, caused by an act or omission of any employee of the Community while acting within the scope of that person's office or employment, unless the claimant shall have first presented the claim to legal counsel of the Community.

(B) Legal counsel of the Community shall determine whether the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose.

(C) Upon certification by legal counsel that the defendant employee was acting within the scope of that person's office or employment at the time of the incident out of which the claim arose, the civil action or proceeding shall be deemed an action against the Community under the provisions of this Ordinance and the Community shall be substituted as the party defendant.

(D) In the event that legal counsel has refused to certify that the employee was acting within the scope of that person's office or employment at the time of the incident out of which the claim arose, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of that person's office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the Community under the provisions of this Ordinance, and the Community shall be substituted as the party defendant.

(E) Nothing in this Section shall prevent a claimant from reaching a settlement with the legal counsel of the Community prior to instituting the procedure outlined in this Section.

Section 11. Indemnification of Community Employees

The Community shall indemnify and hold harmless its employees from and against any and all suits, demands, actions, losses, claims, damages, expenses, liabilities, cross-claims and counter-claims, of whatever nature, and costs (including reasonable attorneys' fees in defending against claims) related to, arising out of, based on, or in connection with performing duties within the scope of the employees job or office, where it is determined that the employee acted within their scope of employment or office. The Community is under no duty to indemnify those employees who have not been certified to have acted within the scope of employment or office.

Section 12. Settlement

(A) Legal counsel for the Community is authorized to determine, adjust and settle, at any time, any claim for money damages of \$25,000 or less against the Community for injury to or loss of property, or for personal injury or death, caused by an act or omission of any employee of the Community while acting within the scope of office or employment, under circumstances where the Community, if a private person, would be liable to the claimant. The settlement is final and conclusive on all officers and employees of the Community, unless procured by fraud. The acceptance by the claimant of a settlement is final

and conclusive on the claimant and constitutes a complete release of any claim against the Community and the employee or officer of the Community whose act or omission gave rise to the claim, by reason of the same subject matter.

(B) Legal counsel for the Community is authorized to institute settlement discussions regarding any claim for money damages in excess of \$25,000 and the Business Council of the Community shall have the authority, upon unanimous vote of all members thereof, to accept or reject a proposed settlement reached by the Community's legal counsel and the claimant(s).

Section 13. Attorney's Fees

No attorney licensed or admitted to practice before the Shakopee Mdewakanton Sioux (Dakota) Tribal Court may charge, demand, receive, or collect for services rendered, fees in excess of twenty-five (25) percent of any judgment rendered pursuant to this Ordinance or in excess of twenty (20) percent of any settlement made pursuant to this Ordinance. Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this Section shall be fined not more than \$2,000 and shall lose her or his privilege to practice law before the Shakopee Mdewakanton Sioux (Dakota) Tribal Court.

Section 14. Subrogation

(A) Third parties such as insurance companies, guarantors, bonding companies and other similar organizations

shall be permitted to bring a claim pursuant to this Ordinance in the name of the claimant, provided, however, that such third party shall show that it is expressly permitted to bring a claim and that it has paid a debt to the claimant. No third party shall be entitled to receive compensation pursuant to this Ordinance in an amount greater than that already paid to the claimant. The Shakopee Mdewakanton Sioux (Dakota) Tribal Court may refuse to allow a third party to bring a claim pursuant to this Ordinance when equity so requires.

(B) The appropriate Community insurance carrier shall be permitted to defend on behalf of the Community a claim brought pursuant to this Ordinance.

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Supreme Court, U. S.

FILED

AUG 25 1997

CLERK

No. 96-1037

In The
Supreme Court of the United States
October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioners,

v.

MANUFACTURING TECHNOLOGIES, INC.
an Oklahoma corporation,

Respondents.

On Writ Of Certiorari To The
Court Of Appeals, Division I,
For The State Of Oklahoma

**BRIEF AMICI CURIAE OF THE
CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,
THE MASHANTUCKET PEQUOT TRIBE, AND THE
NATIONAL CONGRESS OF AMERICAN INDIANS,
IN SUPPORT OF PETITIONERS**

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August 1997

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INTEREST OF AMICI CURIAE¹

Amici Curiae are the Cheyenne-Arapaho Tribes of Oklahoma, The Mashantucket Pequot Tribe and the National Congress of American Indians.

The Cheyenne-Arapaho Tribes of Oklahoma are organized under a constitution and by-laws approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act, 25 U.S.C. § 503, with a governing body called the Cheyenne-Arapaho Business Committee (hereinafter the “Tribes”). The United States holds 10,405 acres of land located in Custer County, Oklahoma in trust for the benefit of the Tribes. The United States also holds 67,000 acres in trust for individual tribal members.

Tribal enrollment in 1993 was 10,173. Four thousand seven hundred twenty seven (4,727) members reside within the original 1869 reservation area and an additional 2,833 members live outside that area, but within the state of Oklahoma. In 1987, unemployment of Tribal members in the jurisdiction area was sixty-one (61) percent, and sixty-four (64) percent of the Tribal households participated in food stamp or commodity distribution programs. In 1990, the average annual personal income for adult tribal members in the Tribes’ service area was \$6,042. The mean age of Tribal members was 24.1 years,

¹ Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and counsel for Respondent have consented to the filing of the brief of *amici*. The consents are submitted for filing herewith.

and eighty-five (85) percent of tribal households had children under the age of eighteen. The average education level was 11.6 years; three months below the average education level in the state.

The Tribes own the Lucky Star Bingo Enterprise and several small businesses, all situated on trust lands. These businesses are operated pursuant to management agreements which contain limited waivers of immunity from suit for the enterprise in Tribal Court. There is no waiver of immunity for the Tribe.

The Mashantucket Pequot Tribe is a federally-recognized tribe governed by the Mashantucket Pequot Tribal Council pursuant to the Tribe's Constitution and By-Laws. The Mashantucket Pequot Reservation is comprised of 2,100 acres located in southeastern Connecticut around the town of Mashantucket. In addition, the Tribe owns off-Reservation property and tribal businesses. There are approximately 350 members of the Tribe who reside on or near the Reservation.

The Mashantucket Pequot Tribe has, since 1992, operated the Foxwood Casino Resort on its Reservation, pursuant to Final Mashantucket Pequot Gaming Procedures (Gaming Procedures) approved by the Secretary of the Interior on May 31, 1991. The Tribe and the Casino together employ about 12,500 people. The Tribe has, pursuant to the Gaming Procedures, adopted the Mashantucket Pequot Sovereign Immunity Ordinance [1 Mashantucket Pequot Tribal Laws (M.P.T.L.), Title IV, Chapter 1, "Tort Claims"] which waives the immunity of the Tribe from suit for claims arising from alleged injuries

to patrons of its Casino, and has established a Tribal Court with a Gaming Division to hear all such claims.

The Mashantucket Pequot Tribe has also waived its immunity from suit in both civil and contract actions for the alleged torts of tribal employees and agents apart from the Casino, and for actions arising out of contracts to which the Tribe is a party. It is, moreover, the written policy of the Tribe, and direction in all insurance policies which it purchases, that the defense of tribal sovereign immunity may not be interposed to avoid liability in any action brought for a claim arising outside the Reservation for which coverage applies. Off-reservation enterprises owned by the Tribe are incorporated under the laws of the State of Connecticut and subject themselves to state law and regulation. The Tribe has not, however, generally waived its immunity for those activities which it undertakes as a sovereign with nonmembers outside of Indian Country.

The National Congress of American Indians (NCAI) is the oldest and largest national organization of Indian governments and individuals in the United States. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives, to enlightening the public toward a better understanding of Indian people, and to preserving rights under Indian treaties and agreements with the United States.

Amici have a vital interest in this case, which adversely affects tribal sovereignty for tribes nationwide. The Tribes and the members of NCAI are all involved in efforts at economic development, and many of these efforts involve conducting business outside of Indian

Country. It makes a huge difference in the conduct of such business if tribes lose their immunity from suit simply by virtue of leaving the reservation. The issue of sovereign immunity is a legitimate issue for contract negotiation, but it is an illegal infringement on tribal sovereignty for a state court to abrogate the tribes' immunity.

If the position of the Oklahoma courts in the Kiowa cases are upheld the States could supplant the role of Congress as the arbiter of the sovereign powers of tribes. Moreover, the state court order which allows for seizure in this case of federal funds for tribal programs violates the Congressional policy of furthering tribal self-government, self-sufficiency and economic development, and frustrates the fulfillment of federal programs for Indians.

SUMMARY OF THE ARGUMENT

Indian tribes are sovereign entities with all inherent powers of sovereignty which have not been taken away. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Sovereign immunity from suit is "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). From the very beginning of this Court's handling of the issue of tribal sovereign immunity, such immunity has been viewed as supported by federal law and policy, *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940) (*Fidelity Guaranty*), and waivable only by Congress, or by the Tribes themselves, *Turner v. United States*, 248 U.S. 354, 358 (1919),

Puyallup Tribe, Inc. v. Department of Game of State of Wash., 433 U.S. 165, 167 (1977). Waivers of tribal immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 199 (1976).

The federal policy has long been that tribal sovereign immunity is an important part of Congress' "goal of tribal self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (quoting from *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)). Congress has in some limited situations waived the sovereign immunity of Tribes but has not done so here.

States may not abrogate the sovereign immunity of Indian tribes, *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986). The Oklahoma Courts have mistakenly viewed the question of tribal sovereign immunity as a question of state law and have ignored the unique status of Indian Tribes within the federal system. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 782 (1991).

ARGUMENT

I. AS INHERENT SOVEREIGNS, INDIAN TRIBES HAVE SOVEREIGN IMMUNITY FROM SUIT WHICH THEY CAN WAIVE, BUT ONLY CONGRESS CAN ABROGATE; SOMETHING CONGRESS HAS DONE IN ONLY LIMITED CIRCUMSTANCES NOT APPLICABLE HERE

A. Indian Tribes Have Inherent Sovereignty And Corresponding Immunity From Suit

Indian Tribes are sovereign governments "retain[ing] some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled North America." *National Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). Tribes retain all the inherent powers of a sovereign except as abrogated by Congress.

The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished." F. Cohen, *Handbook of Federal Indian Law* 122 (1945) (sic) (emphasis in original). . . . "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory. . . . [T]hey are a good deal more than 'private, voluntary organizations. . . .'" The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.

United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (citations omitted).

Limited aspects of sovereign immunity have been lost as a "necessary result of [Tribes'] dependent status." *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (criminal jurisdiction over non-Indians). See, e.g., *Johnson v. M'Intosh*, 21 U.S. (Wheat) 543 (1823) (the power to dispose of their lands at their own will, to whomsoever they pleased); *Cherokee Nation v. Georgia*, 30 U.S. (Pet.) 1 (1831) (the power to make treaties with foreign nations other than the United States).

In sharp contrast to these limited areas of lost sovereignty, sovereign immunity from suit has been viewed as "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986); see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (*Santa Clara*) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."). This sovereign immunity stems for the tribe's own sovereignty and is not dependent on a grant from Congress. It has been recognized by the Supreme Court in its early cases. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940); in *Turner v. United States*, 248 U.S. 354, 358 (1919). See also, *Thebo v. Choctaw Tribe of Indians*, 66 F. 372 (1895). And the doctrine has been repeatedly confirmed in modern cases. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (*Potawatomi*); *Santa Clara*, *supra*; and *Wold*, *supra*.

This Court has repeatedly held that tribal sovereign immunity extends to tribal commercial enterprises which deal with nonmembers, even when it is a state which sues. *Blatchford v. Native Village of Noatak and Circle Village*,

501 U.S. 775, 782 (1991), citing *Potawatomi*. In *Potawatomi* the Tribe owned a convenience store, located on trust land, which marketed cigarettes to nonmembers. The State of Oklahoma sought to recover \$2.7 million from the Tribe for taxes on sales to nonmembers. This Court held that the State of Oklahoma could require the Tribe to collect the State's taxes from nonmembers for future sales, but the State was barred by the Tribe's sovereign immunity from obtaining a money judgment against the Tribe for unpaid past taxes. *Potawatomi*, 498 U.S. at 510.

B. Only Congress Can Abrogate A Tribe's Immunity From Suit And It Has Not Done So Here

1. Congress Has Exclusive Authority Over Indian Affairs And It Alone May Abrogate Tribal Sovereign Immunity.

The Constitution delegates to the Congress the power to "regulate commerce . . . with the Indian tribes." U.S. Const. art. I, § 8, cl.3. This Court has acknowledged this delegation, holding that the "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). Congress has likewise expressly acknowledged this power and responsibility. See, e.g., Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101(3) ("[T]he Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with

Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people").

Tribal immunity from suit, like all other aspects of tribal sovereignty, is subject to the superior and plenary control of Congress. This Court has repeatedly held that if the common-law sovereign immunity of tribes is to be limited, it is for Congress to do so. *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991); see *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986) ("[I]n the absence of federal authority, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Turner v. United States*, 248 U.S. 354, 358 (1919) ("without authorization from Congress, the [Creek] Nation could not have been sued in any court; at least without its consent."). Waivers of tribal immunity "cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58, quoting from *United States v. Testan*, 424 U.S. 392, 194 (1976).

In the treatment of their sovereign immunity from suit, Tribes are more similar to foreign sovereigns than to States. *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, (1991).

The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not the latter, implicit. What makes the State's surrender of immunity from suit by sister

States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes.

Id. at 782.

For foreign sovereigns it is the political branches of the federal government which address the status of their sovereign immunity. Congress has exercised this power to limit the immunity of both foreign powers and tribal governments. In adopting the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, Congress subjected foreign sovereigns to liability for commercial activities. *See, e.g., Republic of Argentina v. Weltover Inc.*, 504 U.S. 607 (1992). Congress enacted a policy already put in place by the United States Department of State. That policy was viewed as binding on the courts under the principle that "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945). In like manner it is for Congress to determine the immunity of Tribes. *Blatchford*, 501 U.S. at 782.

2. Congress Has Visited the Issue of Tribal Sovereign Immunity Numerous Times and Has Made Only Limited Exceptions To It

This Court recognized Congress' commitment to continued protection of tribal sovereign immunity in rejecting Oklahoma's invitation "to construe more narrowly, or to abandon entirely, the doctrine of tribal sovereign immunity" in *Potawatomi*, and observed that

Congress has always been at liberty to dispense with such tribal immunity or to limit it. . . . Instead, Congress has consistently reiterated its approval of the immunity doctrine. *See, e.g.,* Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et sequitur*. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Potawatomi, 498 U.S. at 510.

Numerous other statutes express Congress' commitment to tribal sovereignty, economic development, and sovereign immunity. *See, e.g.,* Indian Tribal Justice Support Act of 1993, 25 U.S.C. § 3601(2) ("The United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government."); Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. . . ."); *see, e.g.,* the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450n(1) ("Nothing in this subchapter shall be construed as affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe").

Congress has enacted waivers of the immunity of tribal governments or their officials when it deemed such waiver appropriate. *See, e.g.*, The Indian Civil Rights Act of 1968, 25 U.S.C. § 1303 (ICRA) ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.")²; the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (allowing "citizen" suits against any "person" – defined to include Indian tribes as "municipalities," 42 U.S.C. § 6903(13)(A) – alleged to be in violation of the Act.); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f(c)(3)(A)-(B) (1988) (providing for a waiver of tribal immunity to the extent of insurance purchased to cover tribal business activities carried out pursuant to the Act, but limiting the waiver to exclude prejudgment interest, punitive damages, or "any other limitation on liability imposed by the law of the State in which the alleged injury occurs.")³ the Native American

² The ICRA was narrowly construed to exclude actions for money damages against the Tribe or its officials out of concern for both tribal sovereignty and the potential economic impact on Tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 64-65 and n. 19, 67 (discussing feared impact on Tribe of allowing suits for damages).

³ The entire text of these subsections provides:

(A) Any policy of insurance obtained or provided by the Secretary [of the Interior] pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which

Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4115(c)(4)(B) (providing for a limited waiver of tribal immunity when the tribal official "is authorized and consents on behalf of the tribe and such officer to accept the jurisdiction of the federal courts for the purpose of enforcement of the responsibilities of the certifying officer as such an official.").

Congress has, moreover, provided federal legislative vehicles for tribes to establish business enterprises under federal charters with the option to adopt "sue and be sued" clauses which would waive any immunity otherwise available to these enterprises. *See*, Indian Reorganization Act (IRA), 25 U.S.C. § 477; and for Oklahoma tribes, the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 504-505 (1936). Such business entities are viewed as separate from the sovereign entity. *See, e.g., Seneca-Cayuga Tribe of Oklahoma v. State of Okla. ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989); *Ramey Const. Co., Inc. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (1982). The absence of any express waiver to sue a tribal government organized under section 3 of the OIWA (or

are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.
25 U.S.C. § 450f(c)(3)(A)-(B) (1988).

section 16 of IRA) reinforces the conclusion that those governments remain protected by the established rule of sovereign immunity.⁴

Congress has legislated widely in the arena of tribal sovereignty, and tribal sovereign immunity. It knows how to waive tribal immunity and has done so with great particularity, e.g., n. 3 *supra*. Great care in this arena is exactly what is required. "Crafting a workable waiver statute, which maintains a sufficient amount of immunity while permitting maximum advantages for the tribal business, requires careful planning." Amelia A. Fogelman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 Vir. L. Rev. 1345 (Sept. 1993). Congress is, of course, in a far better position than the judiciary to decide when and if to adjust federal policy on this sensitive issue and to gather the array of

⁴ This Court has never directly held that Tribes may waive their own immunity, but has intimated as much in dicta. See, *Puyallup Tribe v. Department of Game of State of Wash.*, 433 U.S. 165, 173 (1977) ("Respondent does not argue that either the Tribe or Congress has waived [the Tribe's] claim of immunity. . . ."); *Turner v. United States*, 248 U.S. 354, 358 (1919) ("Without authorization from Congress, the [Creek] Nation could not have been sued in any court; at least without its consent."). At least five circuits have recognized waivers by tribes. *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986); *United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143 (8th Cir. 1970). For those doing business with a tribal government or one of its instrumentalities, the issue of immunity to suit is a legitimate issue for negotiation.

information necessary to craft the sort of detailed scheme necessary to adequately protect all interests and take into account individual tribal differences.⁵

C. Tribal Sovereign Immunity Applies Outside of Indian Country

Tribal sovereign immunity is not compromised by tribal activity outside of Indian Country. This Court made it clear in *Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, 433 U.S. 165, 167 (1977), that a plaintiff cannot circumvent a Tribe's immunity from suit by alleging that the conduct on which the suit is based had an off-reservation impact. In *Puyallup*, the Tribe challenged, on sovereign immunity grounds, a state court judgment purporting to exercise jurisdiction to regulate the fishing activities of the Tribe both on and off its reservation. This Court held that sovereign immunity of the Tribe was a sound basis upon which to vacate those portions of the state court order that involved relief against the Tribe without distinction between the Tribe's on or off reservation activities. *Puyallup*, 433 U.S. at 173.

⁵ Given Congress' strong support of sovereign immunity as set out above, the question of whether the Court might at some previous time have had the authority to set aside the "federal common law" doctrine of sovereign immunity is probably moot, *Milwaukee v. Illinois*, 451 U.S. 304 (1981) (federal common law preempted by Congressional scheme). Cf., *United States v. Kimbell Food Inc.*, 440 U.S. 715, 738 (1979) (" . . . in fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy.").

To the same effect is *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986). There the Tribe went off its Reservation to bring suit in North Dakota state court against a nonmember contractor for negligence and breach of contract. The North Dakota Supreme Court ruled that Chapter 27-19 of the North Dakota Century Code conditioned tribal access to state court on the Tribe's waiver of its immunity to have any civil disputes in state court to which it is a party adjudicated under state law. This Court held that the State did not have the power to impose such a condition. This Court noted that "the State's interest in requiring that all of its citizens bear equally the burdens and the benefits of access to the courts is readily understandable. But here, federal interests exist which override this state interest." *Id.* at 888. The Court went to say that "This result simply cannot be reconciled with Congress' jealous regard for Indian self governance. '[B]oth the tribes and the federal government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes.'" *Id.* at 889 (citations omitted). Finally the Court held that the State's action

serves to defeat the Tribe's federally conferred immunity from suit. The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance. . . . And this aspect of tribal sovereignty, like all others, is subject to plenary federal control and definition. Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-91 (1986) (citations omitted).

In addition, in *Potawatomi*, *supra*, the Court distinguished between state regulatory jurisdiction to require Tribes to collect a tax and its lack of ability to enforce any obligation because of the Tribe's sovereign immunity. While *Potawatomi* occurred within Indian Country, it clearly stands for the proposition that even in those situations where state regulatory jurisdiction applies to some extent, sovereign immunity persists. *Potawatomi*, 498 U.S. at 510.

II. THE OKLAHOMA COURTS HAVE IGNORED GOVERNING FEDERAL LAW DEFINING THE UNIQUE STATUS OF INDIAN TRIBES IN THE FEDERAL SYSTEM

The Oklahoma courts have presumed to displace the role of Congress by deciding that it is within their "inherent concurrent jurisdiction" to determine the extent of tribal sovereign immunity where a tribe enters into a commercial transaction outside of Indian Country. *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 61 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996) (*Hoover*). The Oklahoma Court of Appeals in this case relied on the decision of the Supreme Court of Oklahoma in *Hoover*. The facts in *Hoover* are essentially the same as the present case, involving the Kiowa Tribe, and arising out of the same transaction. In *Hoover* the Oklahoma Supreme Court rested its decision on the reasoning of the Supreme Court of New Mexico in *Padilla v. Pueblo of Acoma*, 754 P.2d 845

(1988), *cert. denied*, 490 U.S. 1029 (1989). In *Padilla* the court reasoned that the decision whether to recognize the sovereign immunity of an Indian tribe was "solely a matter of comity." 754 P.2d at 850. It reached this result through reliance on this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), *reh. den.*, 441 U.S. 917 (1979). In that case California's courts asserted jurisdiction over the State of Nevada based on the conduct of an employee of Nevada (an automobile accident) while in California. This Court found that California could determine whether and on what terms to accord its sister states immunity from suit in its courts because the constitutional compact leaves the several states free to do so. It was the mutuality of this concession among the states in the compact that allows each, as a matter of local policy and comity, to determine the immunity it will accord the other. "What makes the State's surrender of immunity from suit by sister States plausible is the mutuality of that concession." *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 782 (1991).

The error in the reasoning of the court in *Padilla*, and therefore by extension the Oklahoma courts, is in treating Indian tribes as states. The difference between states and tribes was addressed by this Court where it upheld the sovereign immunity of the State of Alaska against suit by an Indian Tribe.

The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity [from suit] was for the former, but not for the latter, implicit. What makes the State's surrender of

immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, *Potawatomi Tribe, supra*, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford v. Native Village of Noatak and Circle Village, 501 U.S. 775, 782 (1991) (emphasis in original). The determination of tribal immunity is not, therefore, a matter of comity for each State to decide. Rather, as this Court has repeatedly held, if the common-law sovereign immunity of tribes is to be limited, it is for Congress to do so. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and cases cited there.

The weight of authority in the lower federal courts supports sustaining tribal sovereign immunity. Every federal court which has addressed the issue of tribal sovereign immunity with nonmembers outside of the tribe's jurisdiction has sustained the tribal immunity to suit. *In re Greene*, 980 F.2d 590 (1992), *cert. denied, sub nom. Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994); *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1063-1065 (1995), *cert. denied*, 116 S.Ct. 57 (1995); *Frederico v. Capital Gaming Intern., Inc.*, 888 F.Supp. 354, 357 (D.R.I. 1995); *Elliott v.*

Capital Intern. Bank & Trust, Ltd., 870 F.Supp. 733, 735 (E.D. Tex 1994), *aff'd*, 102 F.3d 549 (5th Cir. 1996).⁶

Except for Oklahoma, and New Mexico, no state court has presumed to take jurisdiction over a sovereign Indian tribe without its consent or in the absence of a congressional act expressly conferring jurisdiction. Those states, other than Oklahoma and New Mexico, that have addressed the issue of tribal immunity in dealings with nonmembers outside of the tribe's jurisdiction have kept faith with the rulings of this Court and upheld tribal immunity from suit in their state courts. *See, e.g., North Sea Products, Ltd. v. Clipper Seafoods Co.*, 595 P.2d 938 (Wash. 1979) (*en banc*); *Gavle v. Little Six, Inc.*, 555 N.W. 2d 284, 290 (Minn. 1996), *petition for cert filed*, 65 U.S.L.W. 3539 (Jan. 29, 1997); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968); *S. Unique, Ltd. v. Gila River*

⁶ In *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), *reh. den.*, 450 U.S. 960 (1981) the Tenth Circuit found that Congress had provided a waiver of the tribes' immunity in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 *et seq.* for an action for money damages brought under the Act by a nonmember who had no remedy in a tribal forum. That result appears to be squarely at odds with *Santa Clara Pueblo*, which held that suits against a Tribe under the ICRA are barred by sovereign immunity, 436 U.S. at 58-59. *Dry Creek Lodge* has, moreover, not been followed by the Tenth Circuit or other courts. Subsequent decisions of the Tenth Circuit have described *Dry Creek Lodge* as "an exception this court has narrowly construed." *See Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1460 (10th Cir. 1989); *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 892 (10th Cir. 1989), *citing White v. Pueblo of San Juan*, 728 F.2d 1307, 1312-13 (10th Cir. 1984); and *Ramey Constr. Co. v. Mescalero Apache Tribe*, 673 F.2d 315, 319 (10th Cir. 1982).

Pima-Maricopa Indian Community, 674 P.2d 1376 (Ariz. App. 1983); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971); *But cf. Dixon v. Picopa Const. Co.*, 772 P.2d 1104 (Ariz. 1989) (which utilizes Arizona's "subordinate economic organization" test to avoid finding waiver of tribal sovereign immunity).

CONCLUSION

For the reasons stated above, the decision of the Oklahoma Court of Appeals should be reversed.

DATED this 25th day of August, 1997.

Respectfully submitted,

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AUG 25 1997

CLERK

No. 96-1037

In The
Supreme Court of the United States
October Term, 1997

KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

On Writ Of Certiorari
To The Oklahoma Court Of Appeals

BRIEF FOR THE SEMINOLE NATION OF
OKLAHOMA AND THE MUSCOGEE (CREEK)
NATION AS AMICI CURIAE IN SUPPORT OF
PETITIONER, KIOWA TRIBE OF OKLAHOMA

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**BRIEF FOR THE SEMINOLE NATION OF
OKLAHOMA AND THE MUSCOGEE (CREEK)
NATION AS AMICI CURIAE IN SUPPORT
OF KIOWA TRIBE OF OKLAHOMA**

The Seminole Nation of Oklahoma and the Muscogee (Creek) Nation respectfully submit this Brief Amici Curiae, with the consent of both parties, pursuant to SUP. CT. R. 37.3.¹

**INTERESTS OF AMICI SUPPORTING
THE KIOWA TRIBE**

Amici are two of thirty-seven federally recognized Indian tribes within the State of Oklahoma, and two of what were formerly known as the "Five Civilized Tribes."² Amici have strong interests in protecting their abilities to perform important governmental functions free from unconsented, private party lawsuits, whether in state, tribal, or federal courts. More specifically, as is the case with other governmental entities enjoying immunity from unconsented suit, Amici seek to safeguard their governmental treasuries, which contain monies derived not only from tribally imposed taxes, licenses and their

¹ Pursuant to SUP. CT. R. 37.6 counsel for Amici state that no counsel for a party authored this brief in whole or in part. Counsel for Amici further state that the Muscogee (Creek) Nation Bar Association has agreed to fund a portion of only the costs associated with printing this brief. Letters of consent on the parties are filed herewith.

² Amici are now referred to simply as members of the "Five Tribes" consisting of the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, the Muscogee (Creek) Nation and the Seminole Nation.

own economic development activities, but also from various federal grant and self-governance programs, under P.L. 93-638, as amended.

Because Amici and most other Oklahoma Indian tribes have a relatively small amount of tribal trust or federally restricted land, and because much of the individual Indian allotted land over which tribes like Amici have jurisdiction have passed out of restricted ownership, many tribes must conduct governmental and economic activities, at least in part, on non-Indian lands. Whether or not a particular agreement was "executed" on tribal lands (as Oklahoma law, but not federal law, now appears to require) is often a difficult issue to resolve. Accordingly, the decisions in the instant case and related Oklahoma cases already decided (and some pending for certiorari consideration by this Court) have had a significant chilling effect on vital economic and contractual activities for Amici.

SUMMARY OF ARGUMENT

Under Art. I, § 8, cl. 3 of the Constitution, Congress is the branch of the United States government that constitutionally has been granted the primary "guardianship" responsibility and plenary power over Indian tribes and Indian affairs. Tribal immunity from unconsented suit was first expressly *recognized* by decisions of this Court. Accordingly, because historically Congress exercises plenary power in either preserving or restricting tribal immunity from suit, the courts have no power to abrogate tribal sovereign immunity. Only Congress should engage

in policy decisions of whether to modify or abrogate tribal immunity. Since Congress, aware of the unanimous federal-court and near-unanimous state-court view that the tribal sovereign immunity doctrine extends to tribal activities outside of Indian country, has elected *not* to modify that result, Amici urge this Court to treat the congressional will as conclusive.

Under the "Indian Commerce Clause," U.S. CONST. Art. I, § 8, cl. 3, Congress alone has the plenary power to determine or alter the scope of tribal sovereign immunity, and Congress consistently has demonstrated that it knows *how* to modify the doctrine *how, where and when it wants to*. A near-century-long line of unwavering decisions from this Court has stated the tribal-immunity principle in unqualified terms. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation").

Amici argue that the current, unqualified rule of tribal sovereign immunity for acts or conduct outside tribal lands adopted by federal courts — and also by most state courts that have addressed this specific issue — promotes important congressional Indian policies including promoting self-determination and "protecting the sovereignty of each tribal government," *see* 25 U.S.C. § 3601(2) (1994). Further Amici contend that the prevalent caselaw addressing the instant issue is neither "unworkable [n]or badly reasoned." *Cf. Payne v. Tennessee*, 501 U.S.

808, 827 (1991) (applying those tests to questions of stare decisis).³

Amici further contend the Oklahoma Supreme Court holdings regarding tribal sovereign immunity for activities outside Indian country are not only contrary to prevailing federal law, but wholly unnecessary. There is no need to disturb the parties' bargained-for contract in which the tribe expressly reserved all of its sovereign rights. The parties knew how to contract to waive tribal immunity from suit but chose not to.

As a threshold matter, Amici will also briefly address the legally-operative distinctions between state, tribal, and federal sovereign immunities, and in so doing will highlight both the principles and precedent pursuant to which the instant dispute should be resolved. In so doing, Amici will distinguish *Nevada v. Hall*, 440 U.S. 410 (1979) (holding that the United States Constitution does not require a state to recognize the immunity from suit of another state in the courts of the former state) a case Oklahoma courts rely on to reach the decisions below.

³ See, generally, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (emphasis added) ("Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, . . . Congress remains free to alter what we have done."); *Patterson v. McLean Credit Union*, 485 U.S. 617, 621 (1988) (Blackmun, J., dissenting from order directing rehearing) ("The parties in this case have not informed us of anything that suggests Congress has reconsidered its position on this . . . matter.").

ARGUMENT AND AUTHORITIES

I. ALTHOUGH OF SIMILAR ORIGIN THE IMMUNITIES OF TRIBES AND STATES FROM SUIT HAVE SIGNIFICANTLY DIFFERENT ATTRIBUTES.

At the time of the United States Constitution's framing, Alexander Hamilton wrote: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind," THE FEDERALIST NO. 81 (Alexander Hamilton) 125-26 (Edward G. Bourne ed., 1937) [hereinafter "FEDERALIST 81"]. In the last one and a half centuries, this Court has reiterated Hamilton's notion:

[It] is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission.

Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858) (Taney, C.J.); *Smith v. Reeves*, 178 U.S. 436, 440-41 (1900). Thus, the roots of the immunity lie in sovereignty. Moreover, this Court has adopted Hamilton's understanding as the foundation of its sovereign-immunity jurisprudence. E.g., *Hall*, 440 U.S. at 415 (1979) ("[T]he notion that immunity from suit is an attribute of sovereignty is reflected in our cases.").

This Court consistently has held that the United States may not be sued without its consent. See, e.g., *McElrath v. U.S.*, 102 U.S. 426, 440 (1881); cf. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (describing that conclusion as "elementary"). All of this Court's rulings on

the sovereign immunity⁴ of states have arisen in the context of Article III and the Eleventh Amendment of the Constitution;⁵ such issues have vexed federal constitutional jurisprudence from the time of this Court's first docketed case, see *Vanstophorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791) (involving an original-jurisdiction suit – later voluntarily withdrawn – by foreign citizens against a state to recover on a loan); cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (concluding that U.S. CONST. Art. III, § 2, para. 1, cl. 6 authorized federal-court suit against unconsenting state by citizen of another state), to the Court's last Term, see *Coeur d'Alene Tribe*, 117 S. Ct. 2028 (holding that federal-court action brought by a tribe against state was essentially an action for quiet title, and barred by Eleventh Amendment).

However, in the context of tribal sovereign immunity, this Court has adopted an approach, what is essentially a "per se" or "categorical" rule: "[W]ithout congressional authority, the 'Indian Nations are exempt from suit.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940)) ["USF&G"]. In short, Amici

⁴ Cf. *Coeur d'Alene Tribe v. Idaho*, 117 S. Ct. 2028, 2033 (1997) ("[T]he Eleventh . . . Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.").

⁵ In addition, in *Nevada v. Hall*, 440 U.S. 410, 421-24 (1979), which addressed the immunity of a state from suit in the courts of another state, this Court examined the potential applicability of the Full Faith and Credit Clause to state immunity. See generally, *infra*, at n.6 (further discussing *Hall*).

contends whether the tribal conduct occurred within or outside of Indian country, the tribe is immune from suit.

Indian tribes derive their sovereignty from their status as extra-constitutional, domestic-dependent nations that hold undiminished powers except as limited by Congress or tribes themselves. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978); *USF&G*, 309 U.S. at 512. Put another way, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 891 (1988) (*Three Tribes II*). That mode of analysis, in turn, is quite distinguishable from the somewhat broader brush (and less statutorily-dependent) approach it has taken with respect to state sovereign immunity questions under Eleventh Amendment. As this Court has noted:

Behind the words of the [Eleventh Amendment and Article III] are postulates which limit and control. . . . There is . . . the postulate that states of the Union, still possessing attributes of sovereignty, shall be immune from suits, save where there has been "a surrender of this immunity in the plan of the convention." *The Federalist*, No. 81.

Principality of Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (citations omitted) (emphasis added).

As noted above, Amici do not suggest that state and tribal sovereign immunities have nothing in common. Sovereignty is the basis for both. Compare *FEDERALIST* 81, *supra*, at 126 ("[T]he exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.") with *Blatchford v. Native Village of*

Noatak, 501 U.S. 775, 780 (1991) ("Indian tribes are sovereigns.") and *Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").

A second similarity is that courts will not find a statutory abrogation of state or tribal immunity unless the congressional intent so to do is clear. *E.g.*, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (states); *Santa Clara Pueblo*, 436 U.S. at 58 (tribes); *cf.* *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339, 354 (1941) (applying Indian-law "canons of construction," pursuant to which ambiguous expressions in federal statutes will not be construed in a manner constrictive of tribal rights); and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.").

Furthermore, states and tribes enjoy immunity from suit even though both have experienced some diminution in sovereignty. *See, e.g.*, *Blatchford*, 501 U.S. at 781-82 (contemplating the original states' voluntary surrender of some aspects of their sovereignty by their ratification of the United States Constitution); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("[The Indian tribes] occupy a territory to which we assert a title independent of their will. . . ."); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives title which the Courts of the Conqueror cannot deny."); *cf.* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing Indian tribes as "domestic dependent nations").

But there are fundamental differences between state and tribal immunities from suit. Highlighting the distinction drawn by the citations to *Cherokee Nation* and *Johnson*, this Court recently observed:

The relevant difference between States and foreign sovereigns . . . is . . . the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 501 U.S. at 782 (first emphasis added, citation omitted). From that divergence, four secondary consequences accrue. First, while this Court has treated state sovereign immunity as exclusively controlled by the United States Constitution, *see, e.g., supra* at 7 (quoting this Court's "plan of the Convention" analysis in *Principality of Monaco*); *Hans v. Louisiana*, 134 U.S. 1, 10-16 (1890) (examining the "original understanding" of Article III as it informs Eleventh Amendment jurisprudence),⁶ it

⁶ While it might initially be thought that *Nevada v. Hall*, 440 U.S. 410 (1979), was the "exception" that proves the rule, that is not the case. In *Hall*, this Court characterized the issue presented by Nevada (whose sovereign immunity was not

has not done so in the tribal sovereign immunity arena, e.g., *Three Tribes II*, 476 U.S. at 890 (characterizing tribal immunity from suit as a creature of federal common law).

A second difference between tribal and state immunity arises from the fact that the "plan of the Convention" called for states, *but not tribes*, to be "represented" in Congress. Cf. *Garcia v. San Antonio Metropolitan Transit District*, 469 U.S. 528, 547-55 (1985) (finding that due to their "representation" in that body, states' needs for judicial remedies under the Tenth Amendment will not often be persuasive). Needless to say, Indian tribes are not congressionally "represented" in the same way as are

recognized by California's state courts) as premised on the existence of a "federal rule of law implicit in the Constitution that requires all States to adhere to the sovereign-immunity doctrine as it prevails at the time the Constitution was adopted." 440 U.S. at 418 (emphasis added). Having thus characterized the federal question presented this Court devoted the residuum of its opinion to issues of constitutional law. *Id.* at 418-20 (examining Article III at its "original understanding"); *id.* at 420-24 (responding to Nevada's Full Faith and Credit Clause contention); *id.* at 424-27 (rejecting argument tendered by Nevada based on structure of United States Constitution).

Moreover, in *Hall*, this Court drew the distinction - in that state sovereign immunity case - between immunity from "suits in the sovereign's own courts and . . . suits in the courts of another sovereign." 440 U.S. at 414-17. But this Court had rejected that distinction with respect to the sovereign immunity of the United States, e.g., *United States v. Shaw*, 309 U.S. 495, 505 (1940) (recognizing federal immunity from suit in state courts), and with respect to the sovereign immunity of Indian tribes, e.g., *Santa Clara Pueblo*, 436 U.S. at 49 (recognizing tribal immunity from suit in federal courts, absent abrogation by Congress); *Three Tribes II*, 476 U.S. at 889-91 (recognizing tribal immunity from state-court suits absent similar abrogation).

states. States participated in a mutuality of concessions at the Constitutional convention whereas tribes were not parties and exist extra-constitutionally. Amici respectfully submit that since Congress has not categorically altered Indian tribes' claim to their continued enjoyment of a tribal sovereign immunity right a categorical analysis is all the more compelling.

A third distinction arises from the federal "trust" responsibility, which relates to Indian tribes but not states. As will be developed further herein, *see infra* at Proposition II, § C, it is Congress which is the primary obligor (and interpreter) of that trust responsibility. *See, e.g., United States v. Mitchell*, 445 U.S. 535, 540-46 (1980). The congressional trust responsibility conjoined with the federal common law (and therefore statutorily amendable) nature of tribal sovereign immunity may well have contributed to this Court's historically unwavering decision to refrain from curtailing tribal sovereign immunity on its own. The federal government has no trust responsibility to states, but it does to tribes.

This Court has from time to time offered the reminder that generalizations are "particularly treacherous" in the field of Indian law. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). Indian tribes are *not* states. Accordingly, it is treacherous indeed to import to tribes notions that are properly applied to states. Cf. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (making a similar point in the context of state taxation of non-Indians in Indian country).

Furthermore, in a number of cases, this Court has analogized tribal immunity from suit to the sovereign

immunity of the United States. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 324 & n.349 (Rennard Stickland, ed., 1982) (citing cases); cf. *USF&G*, 309 U.S. at 512 ("It is as if the immunity which was theirs as sovereigns passed to the United States for their benefit."). The United States has long asserted sovereign immunity with respect to its extraterritorial acts. E.g., 28 U.S.C. § 2680(k) (1994) and this Court has upheld such assertions. See, e.g., *Smith v. United States*, 507 U.S. 197 (1993) (upholding federal sovereign immunity from suit on tort allegedly committed by United States in Antarctica); *United States v. Spelar*, 338 U.S. 217 (1949) (upholding such immunity with respect to tort allegedly committed by United States in Canada). Though not suggesting that tribal and federal immunities from suit are necessarily identical in every particular, see *Three Tribes II*, 476 U.S. at 890, Amici do suggest that the precedents applicable to the *United States'* sovereign immunity rather than *state* sovereign immunity furnish the best lens through which to view cases involving tribal immunity.

II. THIS COURT SHOULD NOT CONSTRICT ITS OWN CATEGORICAL APPROACH TO TRIBAL SOVEREIGN IMMUNITY FROM SUIT.

A. This Court Consistently Has Stated its Tribal Sovereignty Approach in Unqualified Terms, and All Federal Courts and Most State Courts, with Few Exceptions, Have Relied on This Court's Unqualified Tribal Immunity Decisions to Apply the Tribal Immunity Doctrine to Tribal Activities Outside Indian Country.

Indian tribes do not depend on statute or treaty for their sovereign status. E.g., *United States v. Wheeler*, 435

U.S. 313, 320-30 (1978); *Talton v. Mayes*, 163 U.S. 376, 382 (1896). Tribal sovereignty includes tribal immunity from suit, *Potawatomi Tribe*, 498 U.S. at 509; *Santa Clara Pueblo*, 436 U.S. at 58; *Puyallup III*, 433 U.S. at 171-173; *USF&G*, 309 U.S. at 512-513; *Turner v. United States*, 248 U.S. 354, 358 (1919). In turn, tribes' immunity from suit is similar to that of the United States and is categorically upheld, see, e.g., *Santa Clara Pueblo*, 436 U.S. at 58 (emphasis added, citations omitted):

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization" the "Indian Nations are exempt from suit."

Lower federal courts have interpreted this Court's rule on tribal sovereign immunity as either requiring or authorizing the application of tribal immunity from suit in cases involving tribal activities outside Indian country. Amici have found not one case in which a federal court has held that tribal immunity from suit is inapplicable to tribal activities outside Indian country. Cf. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1063 (10th Cir.), cert. denied sub nom., *Willingham v. Sac & Fox Nation*, 116 S. Ct. 57 (1995); *In re Greene v. Mt. Adams Furniture*, 980 F.2d 590, 596 (9th Cir.), cert. denied, 114 S. Ct. 681 (1992); *Romanella v. Hayward*, 933 F. Supp. 163, 167 (D.Conn. 1996); *Federico v. Capital Gaming Int'l, Inc.*, 888 F. Supp. 354 (D. R.I. 1995); *Elliot v. Capital Investment Bank & Trust*, 870 F. Supp. 733 (E.D. Tex. 1994).

With only a few deviations that Amici have found (discussed *infra*), state courts have reached the same conclusion. For example, the Courts of Washington and Arizona have held that tribal sovereign immunity bars suits against tribes arising from their activities outside Indian country. *North Sea Products, Ltd. v. Clipper Seafoods*, 595 P.2d 938, 941 (Wash. 1979) (en banc – all justices concurring) (upholding tribal immunity regarding garnishment action against off-Indian country business); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983) (upholding tribe's sovereign immunity for tribal business's off-Indian country transactions); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968) (Arizona Supreme Court, en banc, unanimously holding no jurisdiction against tribe for tort suit involving off-reservation commercial conduct); *White Mountain Apache Indian Tribe v. Shelly*, 480 P.2d 654 (Ariz. 1970) (tribe immune from suit arising from off-reservation contract). The highest courts of Arizona, New York, and Florida, to take but a few examples, have applied tribal sovereign immunity without even considering the locus of the tribal activity sued upon, *Smith Plumbing Co., Inc. v. Aetna Cas. & Sur. Co.*, 720 P.2d 499 (Ariz. 1986) (tribe properly dismissed as immune even though suit against insurer may proceed); *Ranson v. St. Regis Mohawk Educ. & Comm.*, 658 N.E.2d 989 (N.Y. 1995) (tribal entity immune from suit); *Seminole Tribe of Florida v. Houghtaling*, 589 So.2d 1030 (Fla.App.2d Dist. 1991), *aff'd*, 611 So.2d 1235 (Fla. 1993) (tribe immune from suit despite involvement in commercial enterprise).

It appears that before the New Mexico Supreme Court decided *Padilla v. Pueblo of Acoma*, 754 P.2d 845

(N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) no modern-era state court of last resort had ever held that tribal sovereign immunity was inapplicable to activities outside Indian country. A year and a half ago, and only three months after the New Mexico Court of Appeals strongly suggested that the New Mexico Supreme Court should revisit its *Padilla* analysis, *DeFeo v. Ski Apache Resort*, 904 P.2d 1065, 1068 (N.M. App. 1995), *cert. denied*, 903 P.2d 844 (N.M. 1995), the Oklahoma Supreme Court (relying on its recent tribal-sovereignty-restrictive approach articulated in *Lewis*),⁷ followed the New Mexico Supreme Court's

⁷ E.g., *Lewis v. Sac & Fox Tribe Housing Authority*, 896 P.2d 503, 508, *cert. denied*, 116 S. Ct. 476 (1995) ("Only that litigation which is expressly withdrawn by Congress or that infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance."); *Hoover*, 909 P.2d at 62 (same). The Oklahoma Supreme Court followed *Lewis* in *Aircraft Equipment*, 921 P.2d 359 (Okla. 1996) (same). The *Lewis* line of caselaw has been extensively criticized in the literature, see, e.g., Frank Pommershiem, *A Symposium on Tribal Courts: Introduction*, 19 OKLA. CITY U.L. REV. 1, 3 (1994); Dennis Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era and a Glimpse at the Road Ahead*, 19 OKLA. CITY U.L. REV. 5, 72-73 n. 389 (1994). The Oklahoma Supreme Court's deviations from established federal Indian law, e.g., *State ex. Rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) have been so misguided at times as to be federally enjoined, *Seneca-Cayuga Tribe of Okla. v. Thompson*, 874 F.2d 709 (10th Cir. 1989).

The Oklahoma Supreme Court's reasoning in *Hoover* and subsequent cases distort this Court's holding in *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989), wherein this Court ruled that the well-pleaded-complaint rule precluded removal of a case in which tribal sovereign immunity was asserted as defense. Compare *Graham*, 489 U.S. 838, 840-42 (1989), with *Aircraft Equipment Co. v. Kiowa Tribe of Okla.*, 921 P.2d 359, 362 (Okla. 1996); *First Nat. Bank in Altus v. Kiowa, Comanche and Apache*

Padilla approach, *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).⁸ No other state court has reached a similar conclusion.⁹

This Court frequently holds that Congress is presumed to legislate with knowledge of the caselaw treating an issue. *See, e.g., Fogarty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Moreover, in light of the extensive review (and amendment) of statutes such as the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C.A. §§ 450 *et*

Intertribal Land Use Committee, 913 P.2d 299, 300 (Okla. 1996) and *Hoover*, 909 P.2d at 61; *Aircraft*, *id* at 362:

supporting the fact that absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws.

⁸ *See also Aircraft Equipment*, subsequent enforcement proceeding, No. 85272, 1997 WL 222406, (Okla. May 10, 1997); *Carl E. Gungoll Exploration v. Kiowa Tribe of Oklahoma*, No. CIV-96-2059-T, United States D. Ct. (W.D. Okla. 1997); *Kiowa Tribe of Oklahoma v. First Nat. Bank of Mountainview, Okla., Garnishee*, No. CIV-96-1624L, United States D. Ct. (W.D. Okla. 1997); *Citizen Potawatomi Nation v. C&L Enterprises, Inc.*, No. 86,568 (Okla.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. ___ 1997 (No. 96-1721)).

⁹ The numerous cases in which state courts have held that tribal corporations may be sued with respect to their activities outside of Indian country (or for that matter within Indian country in Public Law 280 states), based on the presence of "sue and be sued" clauses in their charters, *see, e.g., Dixon v. Picopa Constr. Co.*, 772 P.2d 1104 (Ariz. 1989) are manifestly irrelevant to the instant dispute in which an Indian tribe itself was the named defendant below.

seq. (1983 & Supp. 1997)), *see, e.g., Pub. L. No. 103-413*, Title I, 108 Stat. 4250 (1994) (providing comprehensive amendments affecting Self-Determination Act contracts), and in light of the congressional actions specifically addressing tribal sovereign immunity, there can be no doubt that Congress is fully informed of the tribal sovereign immunity caselaw generally.¹⁰

B. Congress Has Declined to Adopt Any Blanket Abrogation of Tribal Immunity With Respect to Activities Outside Indian Country.

For over a century, Congress has demonstrated its ability and willingness, on rare occasions, to abrogate tribal sovereign immunity where policy justifications have persuaded it to do so. *See, e.g., Pub. L. No. 93-195*, § 2, 87 Stat. 769 (1973) (*limited* abrogation of tribal sovereign immunity); Act of April 6, 1906, § 18, 34 Stat. 137,

¹⁰ *See, Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985):

Where . . . Congress adopts a new law incorporating sections of a prior law, Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law, at least in so far as it affects the new statutes.

Amici respectfully submit that the same result should obtain when the "incorporated law" is federal common law rather than a statute. *Cf. National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850 (1985):

Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in (28 U.S.C. § 1331).

(citing *inter alia County of Onedia v. Oneida Indians Nation*, 470 U.S. 226, 235-36 (1985)).

144 (held to be a *limited* abrogation of tribal sovereign immunity in *USF&G*, 309 U.S. at 513); Act of June 28, 1898, § 2, 30 Stat. 495 (held to be a *limited* abrogation of tribal sovereign immunity in *Adams v. Murphy*, 165 F. 304 (8th Cir. 1908)). Congress has shown sufficient interest in the field of tribal sovereign immunity for that Court to defer to Congress' intent with respect to tribal activity outside Indian country.

Conversely, both historically and over the last decade, Congress has often been presented with proposals to abrogate tribal sovereign immunity, but Congress has rejected the new policies suggested the existing common law of tribal immunity. In 1988, for example, Congress considered a bill which would have abrogated tribal sovereign immunity with respect to alleged violations of the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq. without reference to whether alleged civil rights violations arose within or outside Indian country. In relevant part that bill, which was proposed as an amendment to the Indian Civil Rights Act provided:

Any aggrieved individual . . . may initiate an action in federal district court for declaratory, injunctive, or other equitable relief against *an Indian tribe, tribal organization, or official thereof*, alleging failure to comply with rights secured by this Act.

S. 2747, 100th Cong., 2d Sess., 134 CONG. REC. S11, 656 (daily ed. Aug. 11, 1988) (emphasis added). But Congress rejected that invitation.

An identical bill was introduced before the 101st Congress in March 1989. S. 517, 101st at Cong., 1st Sess., 135 CONG. REC. S2190 (daily ed. Mar. 6, 1989). But that

invitation too, was declined. Those examples are by no means isolated ones.¹¹

In short, Amici respectfully suggest that Congress has shown sufficient interest in the field of tribal sovereign immunity for this Court to defer to Congress' intent with respect to tribal activity outside Indian country.

Congress has not acted to limit tribal immunity to suit to activities within Indian country only. In its Brief in Opposition to Petition for Certiorari herein, Respondent Manufacturing Technologies cites no federal statute abrogation tribal immunity, and Amici has found no such statute. As this Court noted in *USF&G*, 309 U.S. at 515, "without legislative action the doctrine of immunity should prevail." Amici respectfully submit that this Court should defer to *that implicit* policy choice (which the status quo reflects) as well.

Important congressional policy reasons exist for preserving tribal immunity from unconsented suits. Indian governments are more vulnerable to suit than other governments given tribes' limited resources and small tax bases (if any). Most Oklahoma tribal governments have little revenue to fund and run all the services its members require. As a federal appellate court has recognized before, "[a]s rich as the Choctaw Nation is said to be in lands and in money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required

¹¹ Amici notes that as of the date of writing this brief the proposed Senate version § 120 of the FY 1998 Interior Appropriations Bill suggests an elimination of tribal sovereign immunity upon the tribe's receipt of certain Bureau of Indian Affairs funding. No. 105-163, Senate Bill 2107.

to respond to all the demands which private parties chose to prefer against it." *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895).

During the modern era of congressional policy favoring tribal self-determination and self-sufficiency, "Congress has consistently reiterated its approval of the immunity doctrine." *Citizen Band Potawatomi*, 498 U.S. at 510 (citing examples); *See also, e.g.*, 25 U.S.C. § 3746 and 25 U.S.C. § 3601(2). Moreover, since the self-determination era began in the 1970s Congress has mentioned tribal immunity only when expressly preserving it in statutes that might otherwise be misconstrued.

C. This Court Has Historically Recognized Congress to be the Exclusive Authority to Define, Fulfill, and Apply the Federal Trust Responsibility.

The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution.

Morton v. Mancari, 417 U.S. 535, 551-552 (1974). This Court has historically deferred to congressional actions (and inactions) in that field. *See, e.g., Santa Clara Pueblo*, 436 U.S. at 56-72 (declining to diminish tribal sovereign immunity to an extent greater than Congress had done in the Indian Civil Rights Act). This Court held in *Mancari*, 417 U.S. at 479-80:

[A]s long as the special treatment can be rationally tied to Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

In *Aircraft*, 921 P.2d at 362, the Oklahoma Supreme Court has appeared to have assumed Congress' role regarding policy in the application of tribal sovereign immunity and enforcement of contracts in state court:

Such a policy protects all of our citizens including tribes who voluntarily chose to do business with their fellow Oklahoma citizens. If it were otherwise, the tribes would have difficulty finding anyone willing to risk funds in unenforceable obligations. Such a rule would chill tribal commercial and entrepreneurial business.

Federal trust responsibility policies are best left to Congress, rather than this Court or the Oklahoma Supreme Court.

D. To Limit Tribal Immunity From Suit to Cover Only Tribal Conduct Within Indian Country Would Undermine the Contemporary Congressional Policies Promoting Tribal Self-Determination and Economic Self-Sufficiency and Intrude in Areas Where Congress Enjoys Plenary Constitutional Power.

The modern era congressional reaffirmations of tribal sovereign immunity

reflect Congress' desire to promote the good of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development.

Citizen Band Potawatomi, 498 U.S. at 510 (internal quotation marks omitted); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). From the standpoint of

pursuing Congress' "overriding goal" in the area, the distinction between Indian country and non-Indian country tribal commercial conduct is one without a difference.

The federal policies of tribal self-determination, economic development, and cultural autonomy require tribal sovereign immunity, *see, e.g., United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981); Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982), and only Congress may modify that judgment. *See generally, Baker v. Carr*, 369 U.S. 186, 215-17 (1962) (Courts leave resolution of political questions to Congress); *Atkinson v. Haldane*, 569 P.2d 151, 161-62 (Alaska 1977) (political question doctrine applied to tribal sovereign immunity). Moreover, as noted in *American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (citations omitted).

Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote federal policies of tribal self-determination, economic development and cultural autonomy.

Presumably Congress is aware that the Kiowa land base, like most Oklahoma tribes, is small and comprised of a checkerboard jurisdiction area of trust land, allotments, dependent Indian communities and informal reservation areas as compared with large tribal reservation areas in the west like the Navajo Nation reservation. There are few large, contiguous tracts of tribal lands in Oklahoma. Probably most of the Kiowa government's commercial activities occur primarily on non-Indian

lands. Most tribes must necessarily hold their governmental funds in a local non-Indian bank, located on non-Indian land. It would be entirely impractical to expect tribes to establish banks only on the scarce remaining lands they hold. If a government's treasury is subject to execution at the pleasure of private parties assisted by state jurisdictional powers, no government could function. *Cf. Buchanan v. Alexander*, 45 U.S. (4 How.) 20, 20 (1846):

The funds of governments are specifically appropriated to certain national objects, and if such appropriations may be diverted and defeated by state process or otherwise, the functions of government may be suspended.

Congressional acquiescence to the prevalent federal and state caselaw on tribal sovereign immunity suggests that Congress is satisfied with the status quo. This inaction suggests a congressional policy of prohibiting private parties from suing a tribal government without their consent or seizing tribal government funds in aid of execution of a state court judgment.

With respect to evaluation of the significance of the contemporary congressionally prescribed tribal self-sufficiency goal when weighed against other federal commercial goals, Amici respectfully urge that Congress, not this Court (and to a greater extent, not state or federal courts) is in the best position to perform the balancing and regulation.

III. FOR THE PURPOSE OF APPLYING THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY, NO PERSUASIVE POLICY JUSTIFICATION SUPPORTS THE DRAWING OF A DISTINCTION BETWEEN INDIAN COUNTRY AND NON-INDIAN COUNTRY CONTRACTS WITH INDIAN TRIBES.

In the modern era, sovereign immunity operates to help ensure that "litigation . . . not be allowed to stop or slow down official activities that are essential to governing the nation."¹² Governments today frequently allow suits against themselves (except where a superior sovereign has abrogated the sovereign immunity of a lesser one, see, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453-57 (1976)), but only in the courts, see, e.g., *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 n.9 (1984) ("A State's constitutional interest in [11th Amendment] Immunity encompasses not only whether it can be sued, but where it can be sued"), and on the terms of the waiving government's choosing - be they federal,¹³

¹² 14 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* 200-01 (2d ed. 1985); cf. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 471 (1989) (noting that sovereign immunity "preserves the unhampered exercise of discretion and limits the amount of time the government must spend responding to lawsuits.").

¹³ See, e.g., Federal Tort Claims Act, Act of June 25, 1948, cf. 646, 60 Stat. 842 (1946) (codified as amended at scattered sections of 28 U.S.C.A. § 2671 et seq. West 1993 & Supp. (1997)).

state¹⁴ or tribal.¹⁵ Cf. *Coeur d'Alene Tribe*, 116 S. Ct. at 2033 (drawing parallels between Eleventh Amendment immunity and sovereign immunity). In the instant case, it was explicitly bargained in the contract that "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Rec. App., Ex. A.

A. Sophisticated and Well-Informed Business Partners Are Aware of Tribal Sovereignty, the Existence of Extensive Congressional Oversight and Ways to Contractually Limit the Effects of Tribal Sovereign Immunity.

Parties who engage in commercial transactions with tribal governments should be aware of the special considerations when doing business with a tribal sovereign.¹⁶

¹⁴ [Oklahoma] Governmental Tort Claims Act, tit. 51 Okla. Stat. Ann. § 151 et seq., Laws 1978 c. 203, eff. July 1, 1978 et seq. Laws 1984 c. 226, § 1, eff. Oct. 1, 1985.

¹⁵ Mashuntucket Pequot Tribe Code of Laws, tit. 6, Ch. 1, "Tort Claims-Sovereign Immunity Waiver" and tit. 12, "Civil Actions" (providing limited waiver of sovereignty against the tribal government, tribal employees and volunteers but limiting the waiver to official acts, for certain claims, by notice, within specified time periods, limiting types and amounts of damages and adjudicating claims in a tribal forum only).

¹⁶ See, e.g., William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169 (1994) (highlighting threshold issues for contracting with tribes); John S. Clifford, *Application of Article 9 to Secured Transactions in Indian Country*, 28 U.C.C.L.J. 290 (1995) (suggesting drafting choice of law, forum selection and immunity waivers in contracts with tribes); Mark Jarboe, *Fundamental Legal Principles*

Contracts between Indian tribes and non-Indians are subject to considerable federal oversight.¹⁷ Scholars commenting on the sovereign immunity of Indian tribes conclude that only Congress¹⁸ or tribes themselves can

Affecting Business Transactions in Indian Country, 17 HAMLINE L. REV. 417 (1994); and Walter E. Stern, *Securing Transactions with Indian Tribes*, Paper No. 9, 1989 First Annual Natural Resources Management & Environmental Enforcement on Indian Lands Conf., Albq., Amer. Bar. Assoc. Section of Natural Resources, Energy and Environment (SONREEL), Committee on Native American Natural Resources.

¹⁷ Congress enacted comprehensive statutes in 1834 to regulate trade with the Indians and organized the Department of Indian Affairs. 4 Stat. 729, 735. See, *Williams v. Lee*, 358 U.S. 217 (1959). Tribes cannot waive immunity by contract in matters affecting trust property without the consent of the Secretary of Interior, or of Congress. 25 U.S.C. § 81. Federal law requires that contracts involving tribal lands, including attorney contracts for legal services, must be approved by the Secretary of Interior. In *Green v. Menominee Tribe of Indians in Wisconsin*, 233 U.S. 558 (1914) this Court held a contract void when the contracting party failed to procure this mandatory approval. Further, one who receives money or things of value from an Indian or Indian tribe under such a contract could be subjected to a "qui tam" action. 25 U.S.C. § 81; see, e.g., *Alzheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803 (7th Cir. 1993). The Bureau of Indian Affairs regulates attorney contracts with Indian tribes, see 25 C.F.R. Part 89. For a detailed analysis of secretarial approval needed for many transactions with Indian tribes, see, Vetter, *supra* n. 16, at 170-172.

¹⁸ Amelia A. Fogleman, Note, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Business*, 79 Va. L. Rev. 1345 (1993) and Steven E. Dietrich, Comment, *Tribal Businesses and the Uncertain Reach of Tribal Sovereign Immunity: A Statutory Solution*, 67 WASH. L. REV. 113, 120 (1992) ("no federal court has yet limited tribal immunity to reservation boundaries.").

alter tribal immunity, not state courts or state legislators.¹⁹

If a non-Indian business partner fails to take adequate steps to protect and secure a business transaction with an Indian tribe, such as obtaining a limited waiver of sovereign immunity from the tribe, requiring appropriate collateral to secure the transaction or providing for appropriate contractual recourse, then the trader has only himself or herself to blame.

There are no allegations of fraud here. Manufacturing Technologies knew full well it was dealing with an Indian tribe. In this case, the Kiowa Tribe, far from hiding its sovereign identity and attempting to cloak secretly the Tribe with immunity, fully and explicitly disclosed its intent to retain sovereign protection in the contract. This Court should neither second guess the parties' bargain nor abrogate the long-established doctrine of tribal immunity because a non-Indian trader failed to exercise due diligence in drafting a contract.

B. Manufacturing Technologies Could Have Protected Itself in the Contract by Employing Well-Known Contractual Methods to Deal With Tribal Immunity But Failed to Do So.

In this case the Respondent is a sophisticated business entity and presumably should have been aware of well-established doctrines of tribal immunity and planned its transactions with the tribe accordingly. The

¹⁹ Karen Lee Swaney, *Waiver of Indian Tribal Immunity in the Context of Economic Development*, 31 ARIZ. L. REV. 389 (1989).

Respondent does not have a special trust relationship with the federal government justifying denigration of immunity; the Tribe has the immunity protection and it specifically retained it in the agreement with respondent. This Court should not now second-guess both parties' clear contractual desire to not "subject or limit the Kiowa Tribe's sovereign rights." (Ex. "A," R.A.) If a commercial relationship is really important and the ability to enforce the contract is essential, parties – non-Indian and tribal alike – know how to draft contracts that waive sovereign immunity when they want to.

It is Amici's understanding that the Kiowa Tribe has an annual government budget of less than a million dollars, yet Respondent's judgment in this case alone totals more than half that amount (Kiowa Pet. Cert. at 10, all told the outstanding judgments against the Kiowa government in this and related cases surpass over one and a half times the Kiowa Tribe's annual budget), Kiowa Pet. Cert. at 8). The resulting enforcement of Respondent's judgment has the *de facto* effect of crippling daily tribal government services, forcing lay-offs and disrupting order for the Kiowa people. The effect of denying the bright-line rule of tribal sovereign immunity from suits relating to tribal commercial activity outside Indian country will be devastating to tribal governments. The denial would work a harsh intrusion on government operating capital and a severe impairment of the authority of tribal governments. Such a result would "impose serious financial burdens on already 'financially disadvantaged' tribes." *Santa Clara*, 436 U.S. at 64.

CONCLUSION

In view of the foregoing arguments, the judgment of the Oklahoma Court of Appeals should be reversed with explicit directions to vacate the decision of the trial court and dismiss the action against the Kiowa Tribe of Oklahoma.

Respectfully submitted,

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No. 96-1037

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

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Respondent.

On Writ of Certiorari to the
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THE COLVILLE TRIBAL ENTERPRISE CORPORATION
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question: Whether the sovereign immunity from suit accorded to Indian Tribes as a matter of federal law bars an action brought in state court to recover money damages for a breach of contract arising out of economic activity undertaken by the Tribe outside Indian country.

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AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

Amici are six federally recognized Indian tribes and the wholly owned enterprise of a seventh federally recognized Indian tribe that have a compelling interest in whether tribal sovereign immunity continues to bar actions arising out of economic development activities undertaken by tribes outside of Indian country.¹ An affirmation by

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

this Court of the decision of the Oklahoma Court of Appeals in *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, Pet. App. 1, would significantly infringe on the sovereign rights enjoyed by *amici* and all other tribes.

Amici are the Cow Creek Band of Umpqua Tribe of Indians; the Hoopa Valley Tribe; the Las Vegas Paiute Tribe; the Spokane Tribe of Indians; the Central Council of Tlingit and Haida Indian Tribes of Alaska; the Winnebago Tribe of Nebraska; and the Colville Tribal Enterprise Corporation (a tribal corporation and governmental instrumentality of the Confederated Tribes of the Colville Reservation). *Amici* are engaged in a variety of enterprises both inside and outside Indian country and have significant economic relationships with non-Indian parties. Many of these relationships were structured with the understanding that, absent a clear waiver by the tribe or abrogation by Congress, tribal sovereign immunity would apply. Such an understanding merely reflects the well-established doctrine of this Court and the express policy of Congress to strengthen tribal governments, enhance tribal self-determination, and promote tribal economic self-sufficiency. See Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* (1994); Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1994); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* (1994); Tribal Self-Governance Act of 1994, 25 U.S.C. § 458aa *et seq.* (1994); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). If this Court permits the decision of the Oklahoma Court of Appeals to stand, it would cast doubt on these carefully constructed economic relationships in which tribal sovereign immunity was a freely negotiable term of the agreement.

The protection from suit afforded by tribal sovereign immunity is an important sovereignty right retained by the tribes and protected by the federal government. *Amici* are

gravely concerned over the attempt by the Oklahoma courts to rewrite long-standing legal precedent regarding the scope of tribal sovereign immunity and the plenary power of Congress over Indian affairs. *Amici* support the Kiowa Tribe in challenging the decision of the Oklahoma Court of Appeals.

STATEMENT OF THE CASE

A. Facts and Procedural History

The Kiowa Tribe of Oklahoma ("Kiowa" or "Tribe") is a federally recognized Indian tribal government. Treaties entered into between the Kiowa Nation of Indians and the United States between 1837 and 1867 effectively recognized the sovereignty of the Kiowa and established it, under the parlance of the time, as a domestic dependent nation involved in a trust relationship with the United States. See 15 Stat. 581, 589 (1867); 14 Stat. 717 (1865); 10 Stat. 1013 (1853); 7 Stat. 533 (1837); see also *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (describing Indian tribes as "domestic dependent nations"); see generally *Lone Wolf v. Hitchcock*, 187 U.S. 553, 554-63 (1903) (describing history of relations between the Kiowa Nation and the United States). The Tribe currently has approximately 10,000 enrolled members and owns approximately 1,200 acres of land in Oklahoma, much of it in scattered parcels. In addition, the Tribe has an interest in approximately 3,000 acres of land held in trust by the United States. (Br. for United States as *Amicus Curiae* in Supp. of Pet. at 2 & n.1.) The Tribe operates its government under a Constitution and Bylaws adopted May 23, 1970. The annual budget approved by the tribal voters for 1996-1997 was \$970,533.

This particular case is one of a series of five related suits against the Tribe by creditors with interlocking ownership interests.² These suits arose from the Tribe's

² The four other suits are *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), cert. denied, — U.S. —, 116 S.Ct.

purchase of controlling interest in an Oklahoma business corporation called Clinton-Sherman Aviation, Inc. Clinton-Sherman Aviation had been engaged in aircraft repair and maintenance at the former Clinton-Sherman Air Force Base, an area outside of Indian country. See *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 60 n.2 (Okla. 1995), *cert. denied*, — U.S. —, 116 S.Ct. 1675 (1996). On April 3, 1990, the chairman of the Tribe's unincorporated entity, the Kiowa Industrial Development Commission, signed a promissory note ("Note") on behalf of the Tribe promising to pay Manufacturing Technologies \$285,000 plus interest in exchange for stock. See Note 1-2 (attached as Exh. A to Pet. on Prom. Note, filed Aug. 24, 1993 in the District Court of Oklahoma County, Oklahoma). No cash consideration was paid. (Pet. at 3.)

The record contains scant evidence regarding the nature of the investment: the Tribe and its attorneys relied exclusively on tribal sovereign immunity in defending against the suit. (Def.'s Mot. to Dismiss at 1; Br. in Supp. of Mot. to Dismiss at 2; Answer of Def. at 2; Aff. of Billy Evans Horse at 1; Def.'s Br. in Opp. to Pl.'s Mot. for Summ. J. at 2.) Prior cases and press reports, however, note the interlocking ownership of the creditors. Clinton-Sherman Aviation, Inc., was created by investors Robert M. Hoover, Jr., Gordon Pulliam, William P. Jennings and the Carl Gungoll Estate to provide aircraft maintenance services at the former Clinton-Sherman Air Force Base in Burns Flat, Oklahoma. See Mark A. Hutchison, "Burns Flat Firm Plans To Take Off," *The Sunday Oklahoman*, August 20, 1989, at 1, and Mark A. Hutchison, "All Systems Are Go at Burns Flat Aircraft Maintenance Firm," *The Daily Oklahoman*, January 22, 1990, at 7.

1675 (1996); *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996); *JBK Invs., Inc. v. Kiowa Tribe of Oklahoma*, No. 87,032, Oklahoma Supreme Court (appeal pending); *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, No. 87,031, Oklahoma Supreme Court (appeal pending).

The investors apparently claimed that the maintenance facility would bring in huge revenues and 6,000 jobs in the next three to five years, all based largely on the expectation of federal contracts. See *The Sunday Oklahoman*, August 20, 1989, at 1.

The facts as described in *Hoover*, 909 P.2d at 60, show that Hoover, one of the founders of Clinton-Sherman Aviation, also obtained a promissory note from the Tribe on the same day as the transaction at issue here. The \$142,500 note was secured by 5,000 shares of Clinton-Sherman Aviation stock. See *id.* When the Tribe defaulted, it turned the 5,000 shares over to Hoover, apparently without asserting its sovereign immunity. See *id.* Hoover then sold the shares at public auction to himself for a dollar. See *id.* at 60 & n.3. Hoover thus purchased a \$142,000 cause of action for a single dollar. Gordon Pulliam, the President of Manufacturing Technologies, Respondent in this case, was also a shareholder in Clinton-Sherman Aviation. Yet another owner of Clinton-Sherman Aviation was apparently the beneficiary of a \$200,000 note assumed by the Tribe in another related transaction.

The Note called for the Tribe to make full payment in two installments, 30 and 90 days after the Note was signed, at the Oklahoma City offices of Manufacturing Technologies. See Note at 1. The Tribe did not make either payment. (Pet. at 4.) Three years after the Tribe defaulted on the Note, Manufacturing Technologies sued the Tribe in Oklahoma state court seeking judgment on the Note. (Pet. on Prom. Note at 1.)

The Tribe moved to dismiss the suit on the grounds of tribal sovereign immunity from suits in state courts. (Pet. at 4; Def.'s Mot. to Dismiss at 1.) The Tribe relied on a provision in the Note that stated "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." (Pet. at 4.) The trial court rejected the Tribe's argument and awarded Manufacturing Technologies \$445,471 in damages. (Pet. at 4.)

B. Summary of the Decision of the Oklahoma Court of Appeals

In an unpublished opinion, the Oklahoma Court of Appeals affirmed the trial court's entry of summary judgment against the Tribe. *See* Pet. App. 1. The court conceded that the Note had preserved the Tribe's sovereign rights and described the issue on appeal as whether a state court has jurisdiction "to hear a claim and enter a judgment for damages against a federally recognized Indian tribe which has not waived its sovereign rights." *Id.* The court concluded that state civil jurisdiction did extend to the Tribe under the facts of this case. *See id.*

The court rejected the argument that tribal sovereign immunity protected the Tribe from suit in state court, relying on two recent Oklahoma Supreme Court decisions. In both *First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299, 300 (Okla. 1996), and *Hoover*, 909 P.2d at 62, the Oklahoma Supreme Court held that a contract executed outside of Indian country by an Indian tribe and a non-Indian was enforceable in state court. Given this current state of Oklahoma law, the appeals court here concluded there was "no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding," stating, "This Court will not presume to second guess the reasoning of our Supreme Court." Pet. App. 4.

The analysis of the Oklahoma Supreme Court in *First Nat'l Bank* and *Hoover* relied heavily on *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). The court of appeals retraced the path to *Padilla* as well, Pet. App. 3, and ascribed to *Padilla* the conclusion that state courts may exercise jurisdiction over an Indian tribe engaged in off-reservation activities where state law permits similar actions against the state. *See id.* Accordingly, the appeals court held

that tribal sovereign immunity was inapplicable to off-reservation commercial tribal activity since Oklahoma permits breach of contract actions against the state, and since Congress had not expressly prohibited similar actions against tribes. *See id.* The court also opined that such litigation "does not infringe on tribal self-government." *Id.*

The Oklahoma Supreme Court declined discretionary review. This Court granted the petition for a writ of certiorari on June 27, 1997.

SUMMARY OF ARGUMENT

The decision of the Oklahoma Court of Appeals radically departs from precedent and subverts the constitutionally accorded plenary power of the United States Congress over Indian affairs.

This Court has repeatedly held that Congress and the tribes, not the States, define the limits of tribal sovereign immunity. According to long-standing precedent, absent a clear waiver by a tribe or abrogation by Congress, a tribe is immune from suit. Within these parameters, tribal sovereign immunity provides an absolute defense from suit. At no point has this Court conditioned tribal sovereign immunity on the location of the events giving rise to the dispute or suggested that tribal sovereign immunity would not extend to a tribe acting in a commercial capacity. Rather, this Court has repeatedly rejected attempts by states unilaterally to diminish the scope of tribal sovereign immunity along these lines.

Nevertheless, the Oklahoma courts have attempted to rewrite tribal sovereign immunity doctrine, borrowing liberally, and improperly, from state sovereign immunity jurisprudence to conclude that states have the option whether to recognize a federally protected sovereignty interest. The analogy drawn by the Oklahoma courts has no legal or historical basis and reflects a fundamental mis-

understanding of the nature of tribal sovereignty. Moreover, the cases upon which the Oklahoma courts rely for the proposition that a state may enforce its non-discriminatory laws against Indian tribes who engage in conduct that reaches outside Indian country have held only that a state may have the authority to tax or regulate these activities. Those decisions in fact confirm the continued vitality of tribal immunity.

Finally, the Oklahoma courts failed to consider significant federal and tribal interests that militate against a diminution in tribal sovereign immunity. Congress has repeatedly reaffirmed the goals of strengthening tribal governments, enhancing tribal self-determination, and promoting tribal economic self-sufficiency. The federal doctrines underlying tribal sovereign immunity encourage tribal governments to engage in economic activities which improve employment, health, education, and self-sufficiency in tribal communities. If political or economic needs dictate, tribes can freely decide to waive or limit their sovereign immunity, but otherwise sovereign immunity protects emerging tribal governments and tribal resources from potentially ruinous legal and financial liability.

Experience with sovereign immunity at the state and federal levels demonstrates that governments ultimately reform their immunity doctrines after achieving a requisite level of financial security. Today, most tribes confront the challenges faced by the infant federal and state governments early in the Nation's history. Sovereign tribes deserve the same opportunity to develop while protected by immunity, but if changes are to be made in the scope of that immunity, the task belongs to Congress, not a state court of appeals.

ARGUMENT

In determining to allow suits to proceed against tribes unless Congress expressly prohibits them, the Oklahoma courts have turned the doctrine of tribal sovereign immunity precisely backward. Congress has plenary power, subject only to other constitutional limits, to determine the nature and scope of tribal sovereignty. The proper question, therefore, is whether Congress has affirmatively withdrawn immunity from the tribe. Since it has not, the State is without power to dispense with tribal sovereign immunity. The decision of the Oklahoma Court of Appeals and the cases on which it rests subvert the law, allowing the State to do what only Congress may do lawfully. The end result is contrary to the Supremacy Clause, federal Indian law, and the right of tribes to self-determination, self-government, and sovereignty.

I. TRIBAL SOVEREIGN IMMUNITY PROTECTS THE TRIBE FROM SUIT

The court of appeals was bound by the decision of the Oklahoma Supreme Court in *Hoover*. That case confused state authority over individual Indians with state authority over Indian tribes. It confused the position of states in our federal system with the position of Indian tribes. It confused jurisdiction to consider a tribal sovereign immunity defense with the power to set aside tribal sovereign immunity altogether. As a result, it took a power that belongs to Congress—the power to define the extent of tribal sovereign immunity—and vested it in the State. Each of these errors should be corrected by this Court.

A. Congress, Not the States, Defines the Limits of Tribal Sovereign Immunity

Decisions of this Court have repeatedly held that Congress, and not the States, controls the limits of tribal sovereign immunity.

Based on the unique status of Indian tribes as domestic dependent nations, Congress has plenary power over the scope of tribal sovereign immunity, subject to other constitutional limitations. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 414-15 (1980). Only Congress or a tribe may abrogate or waive tribal sovereign immunity. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986). Accordingly, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes*, 476 U.S. at 891. Tribes, like any other sovereign, may choose to consent to suit or may prospectively waive their sovereign immunity through statute or contract. See, e.g., *Alzheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir.) (offering example of limited express waiver of tribal sovereign immunity), *cert. denied*, 510 U.S. 1019 (1993); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508, 510 (8th Cir. 1975) (finding limited express waiver of tribal sovereign immunity). Any waiver of sovereign immunity by a tribe or abrogation by Congress must be in clear and unmistakable language. See *Citizen Band Potawatomi*, 498 U.S. at 509 (1991); *Santa Clara Pueblo*, 436 U.S. at 58. Thus, federal law is the only outside power that can diminish tribal sovereignty. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982).

In *Citizen Band Potawatomi*, 498 U.S. at 509, the Court reaffirmed that "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." This understanding reflects long-standing precedent. See *Blatchford v. Native*

Village of Noatak, 501 U.S. 775, 782 (1991) ("We have repeatedly held that Indian tribes enjoy immunity from suit by States."); *Three Affiliated Tribes*, 476 U.S. at 890-91 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); *Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common law immunity from suit enjoyed by sovereign powers."). See also *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 172 (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

B. The Rationale of *Nevada v. Hall* Does Not Apply to Indian Tribes

The appeals court conceded that the Tribe did not waive its sovereign immunity in signing the Note. Nor has there been any suggestion that Congress has abrogated the Tribe's sovereign immunity in any respect. Nevertheless, the appeals court found the Note enforceable in state court notwithstanding the Tribe's claim of sovereign immunity. In reaching this conclusion, the appeals court relied heavily on the *Hoover* decision—a case arising out of the same transaction and also involving the Kiowa. To conclude that tribal sovereign immunity did not apply to the Kiowa transaction, the *Hoover* court adopted the reasoning employed by the New Mexico Supreme Court in a similar case. See *Hoover*, 909 P.2d at 61 (citing *Padilla*, 754 P.2d at 850-51).

In *Padilla*, the court reasoned that a forum state's decision to recognize tribal sovereign immunity from suit was no different than the decision to accord a sister state immunity from claims arising out of activity by the sister state in the forum state. See 754 P.2d at 850-51. Relying on *Nevada v. Hall*, 440 U.S. 410 (1979), the New Mexico Supreme Court determined that the decision to recognize another sovereign's immunity, be it a sister state or an

Indian tribe, was nothing more than a matter of comity. See *Padilla*, 754 P.2d at 850. The *Hoover* court concluded that, since Oklahoma permitted suits for breach of contract to proceed against the state and nothing other than comity prevented Oklahoma from refusing to recognize the immunity of another sovereign, state or tribe, a contract executed between an Indian tribe and a non-Indian outside of Indian country is enforceable in state court. See *Hoover*, 909 P.2d at 62. Such reasoning, however, is ill-founded and ignores the unique position that federally recognized Indian tribes occupy in the law. See generally Comment, "Recent Cases: *Padilla v. Pueblo of Acoma*," 102 *Harv. L. Rev.* 556 (1988) (criticizing the *Padilla* decision).

This Court has warned that Indian tribes "are not states, and the differences in the form and nature of their sovereignty make it treacherous" to reason too quickly by analogy. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). This admonition is particularly true with regard to tribal sovereign immunity. In *Blatchford*, the Court declared that

[w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession [achieved by being parties to the Constitution]. There is no such mutuality with . . . Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

501 U.S. at 782 (internal citation omitted).

The reasoning in *Nevada v. Hall* is based squarely on the principle that the States were able to protect and define their rights at the time of the Nation's founding. The Court presumed that the Framers assumed "that prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the

courts of one State to assert jurisdiction over another" and so "the need for constitutional protection against that contingency was not discussed." 440 U.S. at 419. The tribes were not at the Constitutional Convention. Moreover, to the extent Indian nations have surrendered control of their sovereignty, they surrendered it to the federal government, not the States. Just as a state may not decide to ignore the sovereign immunity of the federal government, it also may not abrogate a tribe's sovereign immunity without the consent of Congress or the tribe. Congress has not consented, the Tribes have not consented, and no consent can be found in the plan of the convention. The *Padilla* court's application of *Nevada v. Hall* to Indian tribes has no basis in law or history.

C. The Oklahoma Courts Have Confused Jurisdiction to Consider a Tribe's Sovereign Immunity Defense With the Power of the State to Dispense With That Immunity

Partly through its reliance on *Padilla*, the Oklahoma Supreme Court in *Hoover* dispensed with tribal sovereign immunity in off-reservation contract actions without referring to any of this Court's cases regarding tribal sovereign immunity cited above.

The *Hoover* court cited *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989), in support of its statement that "[i]t is settled that absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws." *Hoover*, 909 P.2d at 61. *Graham*, however, addressed only the applicability of the well-pleaded complaint rule to a tribe's sovereign immunity asserted as a defense. This Court held that, like most defenses based on federal law, tribal sovereign immunity asserted as a defense does not state a federal question and therefore would not confer removal jurisdiction on the federal district court. *Graham*, 489 U.S. at 842. That the state courts

retain jurisdiction over the the subject matter does not give them the authority to apply state law to, or disregard the federal defense of, sovereign immunity. Federal law remains supreme whether applied by a federal or a state court.

D. The Oklahoma Courts Have Confused Civil and Regulatory Jurisdiction Over Individual Indians With the Power to Set Aside the Immunity of the Tribe

The cases upon which the Oklahoma courts rely for the proposition that a state may enforce its non-discriminatory laws against Indians who engage in conduct outside of Indian country, namely *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), have held only that a state may have the authority to tax or regulate these activities. As *Citizen Band Potawatomi* makes clear, however, this authority does not include the right to sue the tribe directly to enforce such taxes or regulations absent a waiver. See 498 U.S. at 514. In fact, the Court stated both that "[t]here is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy" of suing the tribe directly, and that "we are not persuaded that it lacks any adequate alternatives." *Id.* at 514. The Court went on to offer a number of alternatives, including the final option of seeking "appropriate legislation from Congress." *Id.* This suggestion leads the states to the only non-tribal body that can alter or limit the immunity of the tribes: Congress. The courts of Oklahoma have no such power.

II. THIS COURT HAS LONG RECOGNIZED THE IMPORTANCE OF TRIBAL SOVEREIGN IMMUNITY

A. The Doctrine of Tribal Sovereign Immunity Is Well Settled

Early in this century, this Court formally recognized that Indian tribes enjoy the immunity from suit traditionally enjoyed by sovereigns. See *Turner v. United States*, 248, 354, 358 (1919). This formal recognition was in accord with much earlier decisions authored by Chief Justice Marshall. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (recognizing Indian tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515, 560 (1832), (observing that by associating with the stronger federal government, Indian tribes have not surrendered their sovereignty and independence). This doctrine remains a vital component of Indian law. See *United States v. Wheeler*, 435 U.S. 313, 323 (1975) (observing that "our cases recognize that the Indian tribes have not given up their full sovereignty"). "Indian tribes enjoy immunity because they are sovereigns predating the Constitution . . . and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (citing *United States Fidelity & Guar. Co.*, 309 U.S. at 512-13 (1940); *Turner*, 248 U.S. at 357-58; Felix S. Cohen, *Handbook on Federal Indian Law* 324-28 (1982 ed.); Note, "In Defense of Tribal Sovereign Immunity," 95 *Harv. L. Rev.* 1058, 1073 (1982)).

Tribal immunity is also consistent with early cases of this Court which held that under no circumstances would a state have the authority to interfere in the management of Indian affairs. See, e.g., *Worcester*, 31 U.S. at 560-61 (invalidating application of state law to territory held by Indian tribes). In fact, this Court recognized the explicit threat that state jurisdiction posed to the survival of

Indian tribes. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (observing that “[b]ecause of local ill feeling, the people of the State where [tribes] are found are often their deadliest enemies”). Rather than place Indian tribes at the mercy of the States, the Court upheld the reservation of plenary power over Indian affairs to the federal government. See *Worcester*, 31 U.S. at 561; *Kagama*, 118 U.S. at 384.

B. The Situs of the Events Giving Rise to a Suit Against a Tribe Has Not Affected and Should Not Affect the Application of Tribal Sovereign Immunity

In view of the established place of tribal sovereign immunity in federal law, there is no support for territorial limits on its reach. This Court has never conditioned tribal sovereign immunity from suit on the location of the events that give rise to the dispute. In fact, the Court has declined to draw such a distinction when urged. See *Puyallup Tribe, Inc.*, 433 U.S. at 167-68.

In *Puyallup Tribe, Inc.*, a tribe challenged a state court’s assertion of jurisdiction to regulate the fishing activities of the tribe “both on and off the reservation.” *Id.* at 167. The tribe advanced two separate, but related, arguments: (1) that the doctrine of sovereign immunity prevents a state court from entering a judgment directly against a tribe; and (2) that a state lacks the authority to regulate any fishing activities that occur within a reservation. See *id.* In concluding that the state did not have authority to regulate tribal activities, this Court declined to impute a territorial restriction to tribal sovereign immunity, but instead chose to distinguish between actions of a tribe, which are protected by sovereign immunity, and actions of individual tribal members, which may be subject to non-discriminatory state regulation even within a reservation. See *id.* at 167, 172-73 (finding claim of sovereign immunity advanced on behalf of the tribe “well founded” but concluding that it “does not

immunize individual members of the Tribe”). Stating conclusively that absent waiver or consent “a state court may not exercise jurisdiction over a recognized Indian tribe,” this Court vacated those portions of the state court order that involved relief directly against the tribe. *Id.* at 172, 173.

Similarly, the Court has never concluded that tribal sovereign immunity fails to protect a tribe acting in a commercial capacity. See *Citizen Band Potawatomi*, 498 U.S. at 510. Nor has Congress chosen to prevent tribes from asserting sovereign immunity in connection with commercial activities, though it has shown the ability to craft such a limitation. Cf. 28 U.S.C. § 1605(b) (1994) (providing that foreign states shall not be immune in any case in which the action is based on a commercial activity).

C. Tribal Sovereign Immunity Protects Emerging Tribal Governments

The Court has recognized that at one point in the history of this country the principles underlying sovereign immunity were extremely important. See *Nevada*, 440 U.S. at 418. At a time when the infant state governments were struggling to establish themselves in the face of limited and uncertain revenues, they relied upon sovereign immunity to protect them from creditors and others who would raid the public fisc and threaten the very existence of emerging political and civic institutions. See *id.*

Although this “infant government” rationale may no longer apply to the complex multi-billion dollar state governments of contemporary America, it still holds particular relevance for those tribal governments across the country who are just beginning to emerge as viable political, economic, civic, and cultural entities. Because most tribes suffer from limited resources, dependency on the federal government, and modest tax bases, immunity from damage suits is tremendously important to their

continued development. See Comment, "Recent Cases: Padilla v. Pueblo of Acoma," 102 *Harv. L. Rev.* 556, 560 (1988). Among its other goals, tribal sovereign immunity "is intended to protect what assets the Indians still possess from loss through litigation If tribal assets could be dissipated by litigation, the efforts of the United States to provide the tribes with economic and political autonomy could be frustrated." *Cogo v. Central Council of the Tlingit and Haida Indians of Alaska*, 465 F.Supp. 1286, 1288 (D.Alaska 1979).

Experience with sovereign immunity at the state and federal levels demonstrates that governments reform their immunity doctrine only after achieving the economic strength sufficient to withstand significant legal and financial liability. The unfortunate circumstances that have followed the Oklahoma courts' decisions in the Kiowa cases acutely illustrate, by contrast, the current vulnerability of developing tribal governments. The results validate Congress' decision to retain tribal sovereign immunity as part of its overall policy of tribal self-determination. The instant case alone has resulted in judgments, including interest and fees, that total nearly \$500,000. This is a significant burden for a tribe with an annual budget of less than \$1,000,000.

Alarming, the Kiowa Tribe has actually been stripped of its tribal tax revenue and had its federal program funds frozen by garnishment. As a remedy in aid of execution, Kiowa has been enjoined from enforcing tribal tax laws in Indian country subject to its jurisdiction. Seizure by creditor's bill of Kiowa's oil and gas severance tax was recently upheld, along with the issuance of an injunction prohibiting Kiowa from enforcing its tribal tax lien law. See "*Aircraft Equipment Company v. Kiowa Tribe of Oklahoma*," 68 *Okla. Bar Jour.* 1649 (May 10, 1997). The Tribe has been forced to defend against post-judgment garnishments that froze federally appropriated funds intended for various social programs under the Indian

Self-Determination and Education Assistance Act, 25 U.S.C. § 450(a) *et seq.* (1994), and various tribal governmental purposes under the Indian Tribal Judgment Funds Use and Distribution Act, 25 U.S.C. § 1401 *et seq.* (1994). See *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, No. CIV-96-2059-T (W.D. Okla. July 1, 1997); *Hoover v. Kiowa Tribe of Oklahoma*, No. CIV-96-1624 (W.D. Okla., filed Sept. 23, 1996).

Garnishment of federal funds disrupts the programs for which they were appropriated by Congress. Seizure of Kiowa's tribal tax revenues takes funds that would have been used to pay salaries of tribal government employees, maintain tribal real and personal property, fund education and job training programs, and supplement federal-tribal programs. The disruption of federal programs, the seizure of funds needed to run tribal government, and the injunction of enforcement of tribal law constitute serious intrusions by the state upon Kiowa's political integrity and upon Congress' pursuit of its "overriding goal" of encouraging tribal self-government.

D. Tribal Sovereign Immunity Advances the Federal Policies of Economic Development and Tribal Self-Determination

This Court has based its recognition of tribal sovereign immunity on two doctrines. First, because of the tribes' presence on this continent before the arrival of European settlers, "[t]hese Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit." See *United States Fidelity & Guaranty Co.*, 309 U.S. at 512. Second, the Court recognized that tribal sovereign immunity is necessary to protect tribal resources and thus to encourage economic development. See *id.* at 512 n.11 (citing *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908) (noting that, without immunity, "the tribes would soon be overwhelmed with civil litigation and judgments")). Indeed,

the Court has held that encouraging tribal self-government and economic development in Indian country is an "overriding goal" of Congress' policies toward Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202 (1986).

Inherent in Congress' oversight of the welfare of Indian tribes is "the protection of the sovereignty of each tribal government." 25 U.S.C. § 3601(2) (1994). Congress has repeatedly affirmed this responsibility. Legislation passed by the 104th Congress expressly recognized that "the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with the tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people." Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(3), 110 Stat. 4017 (to be codified at 25 U.S.C. § 4101(3)).

In keeping with its role as trustee for the welfare of Indian tribes, Congress has actively advanced policies that strengthen tribal self-determination, cultural autonomy, and economic development. Recent examples of such efforts abound. See Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871 *et seq.* (1994); Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.* (1994). The Indian Reorganization Act both empowered tribes to organize their own governance structures and provided measures authorizing tribes to engage in business. Ch. 576, 48 Stat. 984 (1934) (later codified at 25 U.S.C. §§ 461-479 (1994)). The Court remarked that the act permitted tribes to "assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

In light of recent opportunities for tribal economic activity outside of Indian country, the financial consequences of such litigation are potentially acute, especially

in cases where tribes have yet to achieve self-sufficiency and are thus left with little choice but to enter into economic relationships with non-Indians. Because the threat of financial loss can seriously dissuade tribes from engaging in economic activity, sovereign immunity reduces a tribe's exposure to risk and thus encourages economic development. See generally Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) (providing a general overview of congressional policies encouraging economic development).

Persistent suits against tribes in state and federal courts also interfere with tribal decision-making and thus constrain tribal self-determination. As the Court has emphasized, denying tribal immunity and allowing a state court to have jurisdiction over a tribe's commercial affairs "would undermine the authority of tribal courts and hence would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. 217, 223 (1959).

A number of courts have considered whether tribal sovereign immunity produces a chilling effect on commercial relations between tribes and non-Indian entities. See, e.g., *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992) (considering plaintiff's contention that upholding tribal sovereign immunity will chill commercial relations between tribes and non-Indian banks). The Tenth Circuit, in particular, has criticized these claims for "precisely miss[ing] the point of sovereign immunity, which is the power of self-determination." *Id.* See also *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1064 (10th Cir.), *cert. denied*, 116 S.Ct. 57 (1995). If tribal sovereign immunity does indeed chill commercial relations for tribes, then tribes can freely decide whether to continue to rely on the doctrine. Courts should not presume, however, to second-guess the wisdom of tribal decisions, which include evaluation of the costs and benefits of retaining their sovereign immunity.

Almost all tribes must turn to trade and economic relationships with non-tribal parties in order to achieve meaningful economic development. As a result, tribes themselves have a positive incentive to create a development climate that is amenable to non-Indian parties. At the same time, because tribes are faced with this commercial necessity, tribal sovereign immunity, with its concomitant guarantee against costly litigation, plays an important role in their economic decision-making. Recent testimony before the Senate Committee on Indian Affairs succinctly underscores the critical importance of sovereignty to the welfare of Indian country:

If we look back on the history of federal Indian policy in the Twentieth Century, it is not a coincidence that it has only been in the era of self-determination that a significant number of reservations have begun to break the cycle of poverty and dependence. Sovereignty is one of the primary development resources tribes can have, and the reinforcement of tribal sovereignty under self-determination should be the central thrust of public policy. One of the quickest ways to bring development to a halt and prolong the impoverished conditions of reservations would be to further undermine the sovereignty of Indian tribes.

Economic Development on Reservations: Hearing Before the Senate Committee on Indian Affairs, 104th Cong. (Sept. 17, 1996) (statement of Prof. Joseph Kalt).

The Kiowa provide a telling example of the problems faced by tribes attempting to develop a sustainable commercial base. The Tribe does not have a reservation in the usual sense of having a significant block of contiguous land set aside for its use. Instead, the Tribe holds small, scattered parcels that total about 1,200 acres, along with some interest in about 3,000 acres held in trust for it and two other tribes. The lack of a reservation is not unique to the Kiowa among Oklahoma Indian tribes. For a number of years, Congress pursued a policy of allotting Indian

reservation land to tribal members and opening any "excess" land to settlement. See generally Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) (providing a history of the allotment era). The congressional allotment policy left all Oklahoma tribes with significantly reduced land bases and the unique restrictions associated with a reduced land base. See *id.* at 770-96.

Furthermore, should non-tribal entities be concerned with the consequences of tribes retaining their constitutionally accorded sovereign immunity, they are in no way impaired from offering tribes compensating contractual provisions in exchange for waivers of immunity. In response to such concerns, it is common practice for tribes to agree to waive their sovereign immunity in economic relationships with off-reservation entities. See *McClendon v. United States*, 885 F.2d 627, 631 (9th Cir. 1989) (observing that people dealing with tribes typically address sovereign immunity through negotiation); *American Indian Agric. Credit Consortium, Inc.*, 780 F.2d at 1379 (commenting that "[t]ribes and people dealing with them long have known how to waive sovereign immunity when they so wish"); *Tribal Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs, 104th Cong. (Sept. 24, 1996)* (hearing testimony from Indian law practitioners that "[v]irtually every commercial transaction entered into on an Indian reservation today has a sovereign immunity waiver in there"). Because waiver of tribal sovereign immunity is a contractual provision over which parties may negotiate, those non-tribal parties that consent to contracts in which tribes retain their sovereign immunity knowingly set the terms of their own contracts, and their agreements reflect countervailing benefits in other contractual provisions. Because tribal immunity was in the instant case an explicit contractual term over which consenting parties were free to bargain without coercion, the paternalistic intervention of the courts is both inappropriate and unnecessary.

E. In Accordance With Its Plenary Power Over Indian Affairs, Congress Is the Appropriate Forum for Defining the Extent of Tribal Sovereign Immunity

The decision of the Oklahoma Court of Appeals and the earlier decisions on which it is based subvert the plenary power of Congress over Indian affairs, including the scope of tribal sovereign immunity. Congress is well aware of its power to limit that immunity. It has considered but has chosen not to effect a wholesale abrogation of tribal sovereign immunity. The Constitution leaves that choice to Congress, not to the courts of Oklahoma.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the Oklahoma Court of Appeals be reversed.

August 25, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

KIOWA TRIBE OF OKLAHOMA, PETITIONER

v.

MANUFACTURING TECHNOLOGISTS, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF APPEALS,
DIVISION I

BRIEF OF THE STATE OF OKLAHOMA AS
AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Does the scope of the sovereign immunity from suit accorded Indian Tribes by Federal common law extend to bar actions brought in State court to recover damages for breach of contracts arising out of commercial activities voluntarily entered into by the Tribe outside of Indian Country?

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ARGUMENT:

Neither the Constitution nor the Federal Common-Law "Patchwork Quilt" That Forms the "Backdrop" of Tribal Sovereignty Requires That the Common-Law Immunity From Suit Accorded Indian Tribes be Extended to Tribal Business Ventures Conducted Outside of Indian Country. 7

The Extension of the Immunity From Suit Accorded Indian Tribes by Federal Common Law to Tribal Business Activities Engaged in Outside of Indian Country Would Effectively Render Indian Tribes "Second Class Commercial Citizens," as, in Such Circumstance, Tribes Would Have Difficulty Finding Anyone Willing to Risk Their Funds in Unenforceable Obligations. Such a Rule Would Thus Chill Tribal Commercial and Entrepreneurial Businesses. 13

The Suggestions That the Interest of Both Tribes and Non-Indian Parties Can be Met Through a Tribe's Voluntary Waiver of Its Immunity Prior to Entering Into Business Transactions Outside of Indian Country is not Workable Because: 13

1. Often Non-Indian Parties do not Know That the Tribal Business With Which They are Dealing May be Protected by Sovereign Immunity; . . . 13
2. Serious Questions Exist Regarding a Tribe's Power to Waive Immunity, and 13
3. Non-Indian Parties Can Have But Little Confidence in the Validity of an Attempted Waiver of Immunity, as There are Always Questions Regarding Whether the Proper Tribal Entity has Acted, and Whether it has Acted in the Required Manner to Effectively Waive Immunity. 13

CONCLUSION 16

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v.

MANUFACTURING TECHNOLOGIES, INC., *Respondent*

ON WRIT OF CERTIORARI TO THE
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DIVISION I

**BRIEF OF THE STATE OF OKLAHOMA
AS AMICUS CURIAE SUPPORTING RESPONDENT**

INTEREST OF THE STATE OF OKLAHOMA

The Smithsonian Institution's National Museum of the American Indian, which is located in the Alexander Hamilton U.S. Custom House just north of Battery Park in lower Manhattan, currently has on display an exhibit entitled "Creation's Journey: Native American Identity and Belief." The exhibit is the museum's first major effort to re-exam old concepts and come to new understandings of native cultures and peoples—past, present and future. The exhibit contains the following observation about the adaptability of Indian

people and their cultures made by the museum's Assistant Director for Cultural Resources, Clara Sue Kidwell:

Indians have been trapped in time. Anthropologists of the early 20th century, in trying to define the concepts of culture, froze Indian communities in time as representative of some ideal culture. But Indian people have changed and adapted over time. They have taken things from other cultures and made them part of their own lifestyles.

As the nearly forty federally recognized Indian Tribes in the State of Oklahoma have developed and changed over the years, many have become engaged in a variety of business ventures, and the number of tribal businesses has increased dramatically as the Tribes have become engaged in successful—and at times unsuccessful—commercial enterprises, both inside and outside of Indian Country. This increased economic development by the Tribes has brought with it increased commercial interaction between Tribes and non-Indian parties, and increasingly involved the Tribes in commercial activities outside of Indian Country.

The first-impression issue before the Court today is whether the immunity from suit accorded Indian Tribes by Federal common law extends to tribal business activities engaged in outside of Indian Country. The State has a two-fold interest in the question presented.

First, the State has a strong interest in assuring that all those who enter into commercial transactions within the State—outside of Indian Country—have the courts of the

State available to them to enforce contracts and provide adequate redress for breach of contract.

Second, the State has an interest in the economic development of the federally recognized Indian Tribes that reside within its border, and insuring that Tribes do not become "second class commercial citizens" with whom non-Indian parties are reluctant to deal because of their inability to enforce any contracts entered into between them and the Tribes.

SUMMARY OF ARGUMENT

A.

The issue presented is different from that often presented in disputes between States and Indian Tribes. The issue is not whether the State may enforce its laws with respect to transactions taking place inside Indian Country, but rather, whether a State may exercise jurisdiction over tribal business ventures conducted outside of Indian Country.

The issue presented does not deal with either abrogation or waiver, but rather deals solely with the scope and extent of the immunity from suit which Federal common law accords Indian Tribes. The issue presented is whether such immunity extends to Tribal business activities conducted outside of Indian Country.

B.

The Federal common-law “patchwork quilt”, the “backdrop of tribal sovereignty” that is used to inform the Court’s pre-emption analysis, strongly suggests that the immunity from suit accorded Indian Tribes as a matter of common law does not extend to tribal business activities conducted outside of Indian Country. This “sovereignty backdrop” recognizes that:

- Tribal activities conducted outside the reservation—outside of Indian Country—present different considerations from those conducted inside Indian Country;
- In the absence of express Federal law to the contrary, Indians going beyond reservation boundaries—beyond Indian Country—are generally subject to non-discriminatory State laws otherwise applicable to all citizens of the State;
- Tribal off-reservation [off Indian Country] businesses are not Federal instrumentalities and thus are not protected by the Federal Government’s immunities.

C.

Recent tribal immunity analysis used by this Court, such as in Oklahoma Tax Commission v. Potawatomi Indian Tribe, 489 U.S. 505 (1991), demonstrates that these principles are applicable to tribal immunity issues and further demonstrates that tribal immunity from suit is dependent

upon the tribal activity in question being conducted inside of Indian Country.

In Potawatomi, in deciding whether tribal sovereign immunity was present, this Court put great emphasis on the fact that the tribal property in question was held in trust for the Tribe by the Federal Government and was thus Indian Country. One of the arguments advanced by the Oklahoma Tax Commission in Potawatomi was that since the Potawatomi Tribe’s sale of cigarettes did not take place “on a ‘reservation’ the sale should be held subject to State law in collection.” In addressing that issue, this Court did not simply say, as Petitioner argues, that tribal immunity exists regardless of where the tribal activity takes place. Rather, this Court went to great lengths to find—and also relied upon—the fact that the tribal cigarette sales took place within Indian Country, holding that “the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in John, we find that this trust land is ‘validly set aside’ and thus qualifies as a reservation for tribal immunity purposes.” 489 U.S. at 511. (emphasis added)

Both the analysis used by this Court in Potawatomi and the general common-law principles that Tribes conducting business outside of Indian Country are generally subject to State laws are compatible with the position that the Federal common-law immunity enjoyed by Indian Tribes does not extend to tribal business activities conducted outside of Indian Country.

D.

The extension of the immunity from suit accorded Indian Tribes to tribal business activities conducted outside of Indian Country would not only result in injustices to the non-Indian parties who enter into contracts with Indian Tribes when a Tribe breaches a contract, but would also effectively make Indian Tribes "second class commercial citizens," who because of their "off-reservation immunity" would have a difficult time finding non-Indian parties willing to enter into off reservation business ventures with them.

E.

The suggestion that the simple expedient of a Tribe "waiving its immunity" as a means of enabling Tribes to find willing non-Indian parties to deal with them in their off-reservation business ventures is not a workable solution. First, there are serious questions as to how, and to what extent, Indian Tribes may waive their immunity. Second, there is confusion regarding who, in each Tribe, if anyone, is empowered to waive immunity. In the face of these realities, so-called waivers of immunity will not instill the confidence in non-Indian parties that they will be able to enforce their contracts with Indian Tribes.

ARGUMENT

Neither the Constitution Nor the Federal Common-Law "Patchwork Quilt" That Forms the "Backdrop" of Tribal Sovereignty Requires That the Common-Law Immunity From Suit Accorded Indian Tribes be Extended to Tribal Business Ventures Conducted Outside of Indian Country.

Although no longer possessed of the full attributes of sovereignty, Indian tribes remain a "separate people, with the power of regulating their internal and social regulations." United States v. Kagama, 118 U.S. 375, 381-382 (1886). They are "distinct, independent political communities, retaining their original natural rights in matters of self-government." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978); Worcester v. Georgia, 6 Pet. 515, 559 (1832).

Tribes' sovereign rights and the attributes of sovereignty still retained by them pre-dated the United States Constitution. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Indian Tribes have no constitutional right to retain any attributes of sovereignty; rather, Congress has plenary authority to limit, modify and eliminate the powers of local self-government which the tribes otherwise possess. Id. Thus, Indian Tribes do not possess a Federal Constitutional right to any sovereign attributes, including immunity from suit.

In Rice v. Rehner, 463 U.S. 713, 718 (1983), this Court recognized that while federal treaties and statutes have been

“‘consistently construed to reserve the rights of self-government of tribes,’ *F. Cohen, Handbook of Federal Indian Law*, 273 (1982 ed.),” the Court’s more recent cases have established a “trend. . . away from the idea of inherent Indian sovereign as a bar to state jurisdiction and toward reliance on federal pre-emption.” 463 U.S. at 718, quoting from *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 172 (1973). In applying a pre-emption analysis, this Court employs the tradition of Indian sovereignty as a “backdrop” to inform its analysis. *Rice v. Rehner*, 463 U.S. 713, 718-720 (1983).

The role of tribal sovereignty in this Court’s pre-emption analysis “varies in accordance with the particular ‘notions of sovereignty that have developed from historical traditions of tribal independence.’” *Id.*, and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

When the Court does not find a tradition of sovereign immunity, or if the Court determines “that the balance of state, federal and tribal interest so requires,” the Court’s pre-emption analysis may accord less weight to the “backdrop” of tribal sovereignty. *Rice v. Rehner*, 463 U.S. 713, 720 (1983), See, *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), 154-159, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-151 (1973).

While the “backdrop” of tribal sovereignty has long recognized that Indian Tribes are accorded immunity from suit with regard to activities conducted inside Indian Country, the “backdrop” has also long recognized that tribal activities conducted outside the Reservation—outside of

Indian Country—present different considerations. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, (1973), this Court, in determining whether tribal commercial activities conducted outside of Indian Country were subject to state taxation, first rejected the Tribe’s broad assertions that only the Federal Government had jurisdiction over Indian Tribes.

At the outset, we reject—as did the state court—the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise “[w]hether the enterprise is located on or off tribal land.” Generalizations on this subject have become particularly treacherous.

411 U.S. 145, at 147-148.

Next, this Court recognized that the authority that states possess over Indian activities off-reservation is more extensive than that possessed over on-reservation activities:

But tribal activities conducted outside the reservation [outside of Indian Country] present different considerations. ‘State authority over Indians is yet more extensive over activities . . . not on any reservation.’ *Organized Village of Kake*, supra, 369 U.S., at 75, 82 S. Ct., at 571.

411 U.S. 145 at 148.

Then, holding that when Indians go beyond reservation boundaries, they are, as a matter of Federal common law, generally subject to non-discriminatory state laws, this Court stated:

Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

411 U.S. 145 at 148-149.

The Court also held that tribal business ventures were not Federal instrumentalities. 411 U.S. 145 at 151.

In short, the "backdrop" of tribal sovereignty recognizes that, in the absence of express Federal law to the contrary, Indians are amenable to the general powers of the State, when they go beyond their Reservation boundaries—beyond Indian Country.

The analysis employed by this Court in Oklahoma Tax Comm'n. v. Potawatomi Indian Tribe, 489 U.S. 505 (1981), demonstrates that this general principle of Indian sovereignty is equally applicable to issues involving an Indian Tribe's immunity from suit. In Potawatomi, in deciding whether sovereign immunity was present, this Court put great emphasis on the fact that the tribal activity in question was conducted on tribal property—conducted in Indian Country. One of the arguments presented by the Oklahoma Tax Commission in Potawatomi was based upon the general principles discussed in Mescalero. The argument made was

that since the Potawatomi Tribe's sale of cigarettes did not take place on a reservation, the sales, under the doctrine of Mescalero, should be held subject to state law and collection.

In responding to this argument, this Court did not rule, as the Tribe and Federal Government argued in this case, that tribal immunity exists regardless of whether the tribal activity took place inside or outside of Indian Country. Rather, this Court found, and also relied upon the fact, that the tribal cigarette sales took place on trust land within Indian Country.

First, this Court noted that neither Mescalero nor any other precedent has ever, as the Tax Commission urged, drawn a distinction between tribal trust land and reservations.

... Neither Mescalero nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In United States v. John, 437 U.S. 634, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "validly set apart for the use of the Indians as such, under the superintendence of the Government."

489 U.S. at 511 (emphasis added).

Then, this Court held that because the property upon which the cigarettes were sold was held in trust for the benefit of the Potawatomi Tribe, the land had been validly set aside for the Tribe and "thus qualified as a reservation for tribal immunity purposes":

Mescalero is not to the contrary; that case involved a ski resort outside of the reservation boundaries operated by the Tribe under a 30-year lease from the Forest Service. We said that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U.S., at 148-149, 36 L.Ed.2d 114, 93 S.Ct. 1267. Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*, we find that this trust land is "validly set apart" and thus qualifies as a reservation for tribal immunity purposes.

489 U.S. at 511 (Emphasis added).

The *Potawatomi* decision thus demonstrates that in order for tribal sovereign immunity to attach, the tribal activity in question must take place on land validly set aside for the Tribe.

The Oklahoma Court of Appeal's view of the territorial limits of tribal sovereign immunity is consistent with this decision. The Oklahoma opinions do nothing more than hold the Kiowa Tribe subject to the State's non-discriminatory

contract laws, when the Tribe conducts commercial activities outside of Indian Country.

The Extension of the Immunity From Suit Accorded Indian Tribes by Federal Common Law to Tribal Business Activities Engaged in Outside of Indian Country Would Effectively Render Indian Tribes "Second Class Commercial Citizens," as, in Such Circumstance, Tribes Would Have Difficulty Finding Anyone Willing to Risk Their Funds in Unenforceable Obligations. Such a Rule Would Thus Chill Tribal Commercial and Entrepreneurial Businesses.

The Suggestions That the Interest of Both Tribes and Non-Indian Parties Can be Met Through a Tribe's Voluntary Waiver of Its Immunity Prior to Entering Into Business Transactions Outside of Indian Country is not Workable Because:

1. Often Non-Indian Parties do not Know That the Tribal Business With Which They are Dealing May be Protected by Sovereign Immunity;
2. Serious Questions Exist Regarding a Tribe's Power to Waive Immunity, and
3. Non-Indian Parties Can Have But Little Confidence in the Validity of an Attempted Waiver of Immunity, as There are Always Questions Regarding Whether the Proper Tribal Entity has Acted, and Whether it has Acted in the Required Manner to Effectively Waive Immunity.

The extension of immunity to tribal business ventures has, by some courts, been regarded as inequitable, unwise and unfair; in one such case, the district court stated:

[I]t is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from suit, and able to contract with others ... confident that no redress may be had against it as a matter of right.

Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Au., 395 F.Supp. 23, 29 (D. Minn. 1974)(quoting *Federal Sugar Refining Co. v. United States Sugar Equalization Board*, 268 F. 575, 587 (S.D. N.Y. 1920)).

As one commentator has observed, one of the fundamental problems with extending sovereign immunity to tribal businesses operating outside of Indian Country is the "informational imbalance between Tribes and non-Tribal entities." Brian C. Lake, Note, THE UNLIMITED SOVEREIGN IMMUNITY OF INDIAN TRIBAL BUSINESSES OPERATING OUTSIDE THE RESERVATION: AN IDEA WHOSE TIME HAS GONE, 1996:1 Columbia Business Law Review, 87, 99-104 (1996). As described by Mr. Lake, this informational imbalance is created "when a non-Indian party does not know that the tribal business with which it is dealing is protected by sovereign immunity. The tribal business is given an unfair concealed advantage over its lenders, insurers, customers, and potential business partners. It can breach its contract at will, and sometimes reap a large windfall from the hapless victim." *Id.* at 100. Also, *Cf. S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983). There,

a tribal business contracted to purchase \$177,000 worth of herbicide, received delivery, then simply refused to pay.

In cases in which non-Indian parties do not know that the tribal business they are dealing with can claim immunity, tribal businesses can choose secretly to retain immunity without suffering any of the adverse consequences normally associated with such a choice. This possibility is made more probable in situations where the non-Indian parties do not even know they are dealing with an Indian Tribe, as when the Tribe has formed a corporation, particularly if the corporation is represented by a non-Indian agent. This informational imbalance, alone, makes the suggestion that a simple waiver of immunity solves all problems a non-workable suggestion.

Tribal waiver of immunity is also not a viable solution, because there exists a serious question as to the effectiveness of any attempt by a Tribe to waive immunity. As was observed in the Handbook of Federal Indian Law, many unanswered questions exist regarding an Indian Tribe's power, if any, to waive its immunity:

Tribes cannot waive their immunity by contract in matters affecting trust property without secretarial or congressional consent. Whether tribes may waive their immunity without congressional authorization in contracts not related to trust property has not been decided. It is also uncertain if tribes can waive their immunity through their own legislation without congressional consent.

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW, 325 (1982 ed.) (footnotes omitted).

The third difficulty with the argument that the interest of both sides may be taken care of by a waiver of immunity is the lack of confidence that non-Indian parties have in the effectiveness of any attempted waiver. If waiver were possible, what procedure must each Tribe follow, under its own laws, in order to bring about an effective waiver? Who or what entity in each Tribe would be empowered to act or be required to act?

Such questions are not mere academic questions. For example, in a companion lawsuit, the Kiowa Tribe's Business Committee purchased an aviation business and authorized the Tribe's Bank to use the Tribe's oil and gas severance tax funds to collateralize its interim loan of \$200,000.00. In the lawsuit filed to collect the money due on the loan, the Tribe took the position that the Kiowa Business Committee lacked the power to take such action.

Such uncertainties regarding the effectiveness of any tribal waiver of immunity make it difficult for any non-Indian party to have confidence in the effectiveness of an attempted waiver. For this reason, and for the reasons discussed above, the suggestion that a Tribe's waivers of immunity will address the interest of both parties is not a sound suggestion. Given the realities and uncertainties that exist regarding waiver of immunity, attempted waivers will not keep Indian Tribes from becoming "second class commercial citizens," should immunity be extended to tribal business ventures conducted outside of Indian Country.

CONCLUSION

The extension of sovereign immunity to business ventures of Indian Tribes conducted outside of Indian Country will send an unfortunate message to the non-Indian business

community: Do not deal with Indian Tribes because contracts with Indian Tribes are not enforceable. The undesirability of such a message cannot be reduced by offers to waive immunity, because of the many questions that exist regarding the lawfulness and validity of attempted waivers.

Fortunately, this message need never be delivered, as both the Federal common-law "backdrop" of tribal sovereignty and the analysis used by this Court in its prior tribal immunity cases demonstrate that to qualify for tribal sovereign immunity, the Tribal activity in question must be conducted inside of Indian Country.

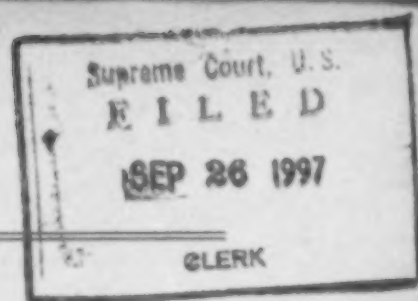
The holding of the Oklahoma Court of Appeals that tribal sovereign immunity does not extend to business ventures entered into by Indian Tribes outside of Indian Country is consistent with the Federal common-law "backdrop" of sovereign immunity and sovereign immunity analysis used by this Court. Accordingly, the decision of the Oklahoma Court of Appeals should be affirmed.

Respectfully submitted,

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17
No. 96-1037



In The
Supreme Court of the United States

October Term, 1996

— ♦ —
KIOWA TRIBE OF OKLAHOMA,

v.

Petitioner,

MANUFACTURING TECHNOLOGIES, INC.,

Respondent.

— ♦ —
**On Writ Of Certiorari
To The Oklahoma Court Of Appeals**
— ♦ —

**BRIEF OF FIRST NATIONAL BANK OF ALTUS AND
RAYMOND L. FRIEDLOB, RECEIVER FOR ALPINE
MUTUAL FUND TRUST AS AMICI CURIAE
IN SUPPORT OF RESPONDENT**
— ♦ —

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INTERESTS OF AMICI CURIAE SUPPORTING
MANUFACTURING TECHNOLOGIES, INC.^{1,2}

First National Bank in Altus (the "Altus Bank") is the plaintiff in *First National Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996), which is one of the cases relied upon by the Oklahoma Court of Appeals in rendering its decision in this case. In 1990 and 1991, the Altus Bank made loans to the Kiowa, Comanche and Apache Intertribal Land Use Committee ("KCA") to own and operate a dress making facility in Altus, Oklahoma. The dress making facility was located on leased land that was not Indian country. The promissory notes were executed at the Altus Bank, which was also not Indian country, and provided for payment at the Bank. The only relationship which this commercial transaction had with an Indian tribe was that KCA was the owner of the facility and the entity that borrowed the money.

After the Oklahoma Supreme Court's decision, KCA commenced an action in the United States District Court for the Western District of Oklahoma entitled *Kiowa, Comanche and Apache Intertribal Land Use Committee v. District Court of Jackson County*, No. CIV-96-1003-L. In that action, KCA sought an injunction against the district

¹ Pursuant to Rule 37.6, Rules of the Supreme Court, counsel for *amici curiae* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the *amici* and their counsel made any monetary contribution to the preparation and submission of this brief.

² The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of this Court.

court and the district judge prohibiting them from proceeding with the state court litigation. In seeking the injunction, KCA claimed sovereign immunity. The federal district court dismissed the action for lack of jurisdiction. The action is currently pending on a motion for rehearing.

Upon remand from the Oklahoma Supreme Court, the Altus Bank pursued the claim in state court and has obtained a judgment against KCA of approximately \$850,000. This Court's decision in the present case may affect the validity or collectibility of the Altus Bank's judgment.

Raymond L. Friedlob has been appointed by the United States District Court for the District of Colorado to act as receiver for Alpine Mutual Fund Trust ("Alpine"), a Massachusetts business trust consisting of two series mutual funds, including California Municipal Asset Trust ("CMAT"). Alpine was registered with the Securities and Exchange Commission (the "SEC") as an open-end investment company. In 1991, after an investigation by the SEC, the SEC requested that the federal court in Colorado appoint a receiver. As part of his duties, Friedlob is responsible for collecting and liquidating the assets of CMAT and protecting the interests of its shareholders. The shareholders in CMAT consist of approximately 750 individuals, many of whom are retired.

CMAT was engaged primarily in the business of making equipment leases, including leases with Indian tribes. In these transactions, CMAT would typically loan money for the acquisition of machinery and equipment

for a business to be operated by the tribe. The contracts were often negotiated and executed outside of Indian country. CMAT typically required the tribe to provide an opinion of its counsel that the agreement was valid, binding and enforceable in accordance with its terms.

Friedlob is currently in the process of attempting to collect in excess of \$1,500,000 which is owed by the Comanche Tribe of Oklahoma and the Kiowa Tribe of Oklahoma. In each case, Friedlob commenced litigation in state court in Oklahoma. Despite the opinions of counsel, both tribes have raised the defense of sovereign immunity. The trial courts have denied the defense of sovereign immunity and the actions are still pending.

In addition to asserting the defense of tribal immunity in the state court action, the Comanche Tribe commenced a separate action in federal court seeking to enjoin the district judge and the district court from proceeding with the state court litigation. The Comanche Tribe asserted that the action should not proceed because of its claim of sovereign immunity. That action was dismissed by the federal court for lack of jurisdiction and is now pending on appeal before the Tenth Circuit Court of Appeals as *Comanche Indian Tribe v. District Court of Grady County*, No. 97-6194.

Friedlob has a direct interest in the outcome of the present case because if the decision of the Oklahoma courts is reversed and the Kiowa Tribe is found to be protected by sovereign immunity, the efforts by Friedlob to liquidate the claims against the Comanche Tribe and the Kiowa Tribe will be affected.

ARGUMENT AND AUTHORITIES

I. TRIBAL SOVEREIGN IMMUNITY DOES NOT EXTEND TO ACTIVITIES CONDUCTED BY A TRIBE OUTSIDE OF ITS TERRITORIAL JURISDICTION.

Petitioner, Kiowa Indian Tribe (the "Kiowa Tribe") and their supporting *amici curiae* urge the Court to extend tribal sovereign immunity to activities which tribes conduct outside of their territorial jurisdiction. The Kiowa Tribe and the supporting tribes seek the protection of sovereign immunity for any activity which they may conduct anywhere in the United States. No government, whether state, federal or foreign, enjoys the protection which the tribes seek to obtain in the present action. Contrary to the position asserted by the Kiowa Tribe and the supporting tribes, the absolute sovereign immunity enjoyed by any government is limited to activity which that government conducts within its own territorial jurisdiction. When a government goes beyond its own jurisdictional boundaries and engages in activity within another jurisdiction, the sovereignty of the host jurisdiction is necessarily implicated. *Nevada v. Hall*, 440 U.S. 410, 416, 99 S.Ct. 1182, 59 L.Ed.2d 416, 422 (1979). The host government, in the exercise of its own sovereignty, has the right to determine whether to recognize the sovereign immunity as a matter of grace and comity.

To determine whether an Indian tribe is protected by sovereign immunity when it engages in commercial activities outside of its jurisdictional boundaries, the Court must consider the characteristics of tribal sovereign

immunity and the nature and history of sovereign immunity between nations. The nature of tribal sovereign immunity was described in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106, 115 (1978):

Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.

The comparison of tribal sovereignty to foreign sovereignty was reiterated in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782, 111 S.Ct. 2578, 115 L.Ed.2d 686, 696 (1991) where this Court stated:

Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic. The relevant difference between States and foreign sovereigns, however, is not domesticity, but the role of each in the convention within which the surrender of immunity was for the former, but not for the latter, implicit. What makes the State's surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes.

Finally, in this Court's most recent pronouncement, Indian tribes were again compared with foreign powers with respect to their sovereign immunity. In *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. ___, 117 S.Ct. 2028, 138 L.Ed.2d 438, 447 (1997) the Court reaffirmed its finding in *Blatchford*, *supra*, by stating:

Indian tribes, we therefore concluded, should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity.

Indian tribes, like all other sovereigns, enjoy absolute immunity from suit for activities which occur within their territorial jurisdiction. The State of Oklahoma has not sought to subject the Kiowa Tribe to suit in Oklahoma courts for activities which occurred within Indian country subject to Kiowa jurisdiction. Rather, the present dispute involves commercial activity by the Kiowa Tribe within the State of Oklahoma and outside of Indian country. In such circumstances where one foreign sovereign has voluntarily engaged in activity within the jurisdiction of another sovereign, the determination of whether the foreign sovereign's claim of sovereign immunity will be recognized is one for the host sovereign to make based upon its own laws and grace and comity. This issue was first addressed by this Court in *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 136, 3 L.Ed. 287, 293 (1812) where Chief Justice Marshall stated:

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the

nation itself. They can flow from no other legitimate source.

Since the decision in *The Schooner Exchange*, this Court has continued to recognize that, in the absence of a treaty or other agreement, the determination of whether the sovereign immunity of a foreign government will be recognized must be based upon the laws of the host jurisdiction as a matter of grace and comity. In *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81, 87 (1983) (emphasis added) this rule was reiterated:

As *The Schooner Exchange* made clear, however, *foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.*

Because Indian tribes possess the same common-law immunity from suit traditionally enjoyed by sovereign powers, this case is controlled by the Court's decision in *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979). In that action, a Nevada employee was involved in a car wreck within the State of California. In response to the tort action filed in California state court, Nevada claimed sovereign immunity. California, which had waived sovereign immunity for itself, did not recognize Nevada's claim of immunity. In considering Nevada's claim of immunity from suit in California's courts for activity which occurred within California, this Court noted:

The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts

and the other to suits in the courts of another sovereign.

...
This explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts. Such a claim necessarily implicates the power and authority of a second sovereign; its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity.

...
[I]f California and Nevada were independent and completely sovereign nations, Nevada's claim of immunity from suit in California's courts would be answered by reference to the law of California.

440 U.S. at 414, 416-417, 59 L.Ed.2d at 421-423. The Court then considered and rejected Nevada's claim that the Constitution imposed restrictions on California's right to choose whether or not to recognize Nevada's claim of immunity for activity occurring in California. The restrictions in the Constitution relied upon by Nevada did not abrogate the individual States' status as independent sovereigns:

Collectively they demonstrate that ours is not a union of 50 wholly independent sovereigns. *But these provisions do not imply that any one State's immunity from suit in the courts of another State is anything other than a matter of comity.*

440 U.S. at 425, 59 L.Ed.2d at 428 (emphasis added).

Because Indian tribes are treated as foreign nations for sovereign immunity purposes and because States have the right to decide as a matter of comity whether to recognize the claim of sovereign immunity, Oklahoma was entitled to make this decision in the exercise of its own sovereignty. Just as California had the right to decide whether to recognize Nevada's claim for immunity in *Nevada v. Hall, supra*, Oklahoma has the right to decide whether to recognize the claim of immunity by the Kiowa Tribe.

In the present action, the Kiowa Tribe has voluntarily engaged in commercial activity within the State of Oklahoma. If the claim of sovereign immunity is upheld, Respondent, Manufacturing Technologies, will have no remedy for the breach of contract. Such a result is contrary to the public policy of Oklahoma. Oklahoma requires all governments, state, county and municipal, to fulfill their contractual obligations or be liable in damages. Oklahoma is merely holding the Kiowa Tribe to the same standard. This public policy was expressly announced by the Oklahoma Supreme Court in *Aircraft Equipment Company v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 362 (Okla. 1996):

Behind this reasoning are important public policy considerations. Our contract law protects parties to contracts from arbitrariness that would otherwise control if parties were free to disregard any contract clauses that a disadvantaged party believed would be enforced to its detriment. Contracts are effective when parties know that the provisions of the contract will be enforced in our district courts. Such a policy protects all of our citizens including the tribes

who voluntarily choose to do business with their fellow Oklahoma citizens. If it were otherwise, the tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations. Such a rule would chill tribal commercial and entrepreneurial business.

The result that Indian tribes are not protected by sovereign immunity when they engage in activities outside of their territorial boundaries is merely a recognition of existing law. Not only is that holding compelled by *Nevada v. Hall, supra*, but the result is consistent with other Supreme Court precedent that Indian tribes are subject to state regulation for activities occurring outside of Indian country. This Court has consistently held that tribal activities occurring outside of a tribe's territorial jurisdiction are subject to state regulation. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S.Ct. 1267, 36 L.Ed.2d 114, 119 (1973), this Court held:

But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' *Organized Village of Kake, supra*, at 75, 7 L.Ed.2d 573. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

See *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).

The Kiowa Tribe, the United States, and the other *amici curiae* urge the Court to reach a different result arguing that exclusive federal authority over Indian

tribes is vested with the United States. The Kiowa Tribe urges that such authority arises from the Indian commerce clause of the Constitution. That result was expressly rejected in *Mescalero Apache Tribe v. Jones, supra*, 411 U.S. at 147-148, 36 L.Ed.2d at 119 where this Court stated:

At the outset, we reject - as did the state court - the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise '[w]hether the enterprise is located on or off tribal land.' Generalizations on this subject have become particularly treacherous. . . . The upshot has been the repeated statements of this Court to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.

Finally, the United States suggests that this Court has previously held that tribes were protected by sovereign immunity in state court, even for activity occurring outside the reservation boundaries. In making this assertion, the United States relies upon *Puyallup Tribe, Inc. v. Washington Department of Game*, 433 U.S. 165, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977) and *Oklahoma Tax Commission v. Citizen Band Potawatomie Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). However, the issue of jurisdiction over activities occurring off the reservation was not at issue in either case. In the *Puyallup Tribe* case, the issue, as framed by the tribe was:

The Tribe, supported by the United States as *amicus curiae*, contends in this Court that the doctrine of sovereign immunity requires that the judgment be vacated, and that the state courts of Washington are without jurisdiction to regulate fishing activities *on its reservation*.

433 U.S. at 167, 53 L.Ed.2d at 671 (emphasis added). Likewise, in the *Oklahoma Tax Commission* case, the issue was also clearly framed to be limited to activities on the reservation:

Finally, Oklahoma asserts that even if sovereign immunity applies to direct actions against tribes arising from activities *on the reservation*, that immunity should not apply to the facts of this case.

498 U.S. at 511, 112 L.Ed.2d at 1121 (emphasis added). In fact, the exact opposite conclusion must be drawn from the *Oklahoma Tax Commission* case. As Justice Stevens noted in his concurring opinion, the Court impliedly held that tribes were not entitled to absolute immunity in state courts, when he stated: "My purpose in writing separately is to emphasize that the Court's holding in effect rejects the argument that this governmental entity - the Tribe - is completely immune from legal process." 498 U.S. at 515-516, 112 L.Ed.2d at 1124.

Because the determination of whether a sovereign government must recognize the claim of immunity by a foreign government conducting activity outside of that government's territorial jurisdiction has always been a matter of grace and comity for the host sovereign, Oklahoma is free to determine based upon its own laws and as a matter of comity, whether and to what extent it will

recognize the sovereign immunity of the Kiowa Tribe for the activities occurring outside of Indian country. To deny Oklahoma the right to make this decision is to impinge upon Oklahoma's sovereignty. *Nevada v. Hall, supra*, 440 U.S. at 416, 59 L.Ed.2d at 422. Oklahoma has the right and authority to make such a determination with respect to any foreign nation, and Indian tribes are accorded the same status as foreign sovereigns for sovereign immunity purposes. *Idaho v. Coeur d'Alene Tribe of Idaho, supra*, 138 L.Ed.2d at 447. Oklahoma's decision not to recognize tribal sovereign immunity in this case must be upheld.

II. PRACTICAL CONSIDERATIONS DICTATE THAT INDIAN TRIBES BE TREATED IN THE SAME MANNER AS ALL OTHER GOVERNMENTS WITH RESPECT TO SOVEREIGN IMMUNITY.

If the Kiowa Tribe prevails in this action, the Kiowa Tribe and other Indian tribes will gain a status unique among all governmental entities, whether state, municipal, or foreign. If Oklahoma is denied the right to decide for itself whether to recognize the claim of sovereign immunity for activity occurring outside of Indian country but within the State of Oklahoma, Indian tribes will be free to unilaterally decide whether and how to fulfill contractual obligations. No other government enjoys such status. Indian tribes would be free to engage in commerce throughout the United States knowing that they will never be required to fulfill their contractual obligations. The other party to the contract will have no remedy in any court, state or federal. It is precisely this type of abuse that the Oklahoma Supreme Court was seeking to avoid.

Several of the *amici curiae* have suggested that it is unnecessary to provide non-Indian parties to a contract with a forum for resolution of disputes and enforcement of obligations because such parties are sophisticated businessmen capable of protecting their interests by other means. Even if true with respect to Manufacturing Technologies, the Altus Bank, and others, such a statement is a gross generalization which would certainly not be true with respect to many business situations. Many businesses have never had dealings with Indian tribes in their governmental capacity and would not be aware of the special rules applicable to Indian tribes.

A. Waiver of Sovereign Immunity is Not a Viable Solution.

Several of the *amici curiae* have suggested that a simple waiver of sovereign immunity would be adequate to protect the non-Indian. Waiver of sovereign immunity does not provide a viable solution to this issue. First, it is not entirely clear if or how Indian tribes may waive sovereign immunity. In *United States v. United States Fidelity & Guaranty Company*, 309 U.S. 506, 513, 60 S.Ct. 653, 84 L.Ed. 894, 899 (1940) the Court stated:

It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials.

Assuming that an official can waive sovereign immunity for a tribe if properly authorized, a contracting party must determine whether tribal law authorizes a waiver, what steps are required to grant a waiver, and what

officials are authorized to act. A contracting party would have to review all tribal governmental documents to ensure that a waiver was validly obtained.

The second hurdle for a waiver of sovereign immunity is the waiver language itself. In *Santa Clara Pueblo v. Martinez*, *supra*, 436 U.S. at 58, 56 L.Ed.2d at 115, the Court stated:

It is settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."

Because waivers are strictly construed in favor of Indian tribes, the language must be carefully drafted to cover not only the transaction in question but also any remedies which may be available. If in hindsight, a court determines that the waiver language is not broad enough to cover a particular situation, the injured party will be left without a remedy. Given these difficulties in obtaining a valid waiver of sovereign immunity that was properly worded to cover the transaction, only the largest and most important transactions would warrant the legal expense required. Obtaining a waiver of sovereign immunity is not a viable solution when transacting business with an Indian tribe.

B. Failure to Extend Sovereign Immunity Beyond Indian Country Will Not Impair Tribal Activities or Frustrate Congressional Policies.

The Kiowa Tribe suggests that failure to extend sovereign immunity to activities which they conduct off the reservation will impair their ability to conduct tribal government and will hinder Congress' policy of promoting

tribal self-sufficiency. The Kiowa Tribe asserts that because it has a limited land base, it will be difficult for it to engage in commercial activity.

The Kiowa Tribe as well as other Indian tribes have an opportunity to completely protect themselves from unauthorized suits, whether in state or federal court. Such tribes need only restrict their activities to lands within their jurisdiction. It is undisputed that Indian tribes are protected by sovereign immunity for activities occurring within their jurisdiction.

Restricting activity to a tribe's territorial jurisdiction in order to maintain the benefits of sovereign immunity is consistent with the rights and powers of Indian tribes generally. Like all governments, a tribe is limited by its territorial jurisdiction. As this Court noted in *Hilton v. Guyot*, 159 U.S. 113, 163, 16 S.Ct. 139, 40 L.Ed. 95, 108 (1895):

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.

The jurisdiction of an Indian tribe is similar to that of any other government. An Indian tribe only has jurisdiction over its members and its territory. *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706, 716 (1975); *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 14, 107 S.Ct. 971, 94 L.Ed.2d 10, 18 (1987).

This Court has consistently recognized this territorial limitation on the power of an Indian tribe. In *Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130, 141-42, 102 S.Ct. 894, 904, 71 L.Ed.2d 21, 32 (1982) (emphasis added), the Court described this territorial limitation as follows:

[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe.

The territorial limitation is an inherent aspect of tribal government. The fact that a tribe's land base may be limited does not justify providing special treatment. The land base in Oklahoma is small in comparison to the State of Texas, but Oklahoma does not receive special treatment.

Finally, if a tribe is concerned that its activities outside of Indian country will subject it to jurisdiction, the tribe has an available remedy. It may merely negotiate with the other party to the contract an appropriate choice of law and choice of forum clause designating tribal law and tribal forums as controlling. Choice of law and choice of forum clauses are enforced in Oklahoma. See *Telex Corporation v. Hamilton*, 576 P.2d 767 (Okla. 1978); *Williams v. Shearson Lehman Brothers, Inc.*, 917 P.2d 998 (Okla. App. 1996). This approach has the special advantage of ensuring that the other party to the contract is aware of the special laws applicable to Indian tribes. When faced with the request for a choice of law or choice of forum clause,

a party must inquire as to why such clauses are desired and what effect they will have on the contract.

Recognizing and enforcing the territorial restriction on the powers of Indian tribes will not impair tribal activities. Tribes will be free to engage in whatever activities they desire under whatever rules they may enact within their own territorial jurisdiction. However, when tribes choose to engage in activities outside of their territorial jurisdiction, the State where the activity occurs must be allowed to determine whether it will recognize a claim of sovereign immunity or provide its citizens with a forum and remedy for breach of contract.

CONCLUSION

Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers. With respect to a tribe's own territory, that immunity is absolute. However, when a tribe, like any other sovereign, engages in activity beyond its territorial jurisdiction, sovereign immunity is not absolute. Rather, the sovereignty of the State in which the activity occurs is affected. The State, in the exercise of its sovereignty, has the right to choose whether it will recognize the claim of sovereign immunity as a matter of comity.

In the present case, Oklahoma has chosen to treat the Kiowa Tribe in the same manner as any other government and to provide a remedy and forum to its citizens for breaches of contract within the State. *Nevada v. Hall, supra*, controls this litigation and mandates that Oklahoma has the right to make that determination. This

Court should affirm the decision of the Oklahoma Court of Appeals.

Respectfully submitted,

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No. 96-1037

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,
a federally recognized Indian Tribe,

Petitioner,

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation,

Respondent.

On Writ Of Certiorari To The
Oklahoma Court Of Appeals

BRIEF OF AMICUS CURIAE STATES OF
SOUTH DAKOTA, ALASKA, CALIFORNIA,
CONNECTICUT, FLORIDA, HAWAII, LOUISIANA,
MASSACHUSETTS, MICHIGAN, MONTANA, NEW
HAMPSHIRE, NEW YORK, UTAH, VERMONT AND
WISCONSIN IN SUPPORT OF RESPONDENT

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INTRODUCTION

The States of South Dakota, Alaska, California, Connecticut, Florida, Hawaii, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New York, Utah, Vermont and Wisconsin, respectfully submit a brief amicus curiae in support of Respondent pursuant to Supreme Court Rule 37.

INTEREST OF AMICI STATES

This case differs substantially from other Indian law cases in which the interest of the States arises from the *presence* of Indian country. In this case, the interest of the Amici States lies in ensuring equal treatment of commercial business enterprises conducted by tribes when those enterprises move *beyond* Indian country and in ensuring that tribes may be held directly accountable for compliance with generally applicable, nondiscriminatory state laws with respect to such activities. The States thus have a strong interest in allowing their courts jurisdiction over Indian commercial enterprises when those commercial enterprises move beyond reservation boundaries, just as the state has an interest in assuring that other commercial enterprises which commit civil wrongs are subject to the civil jurisdiction of the state courts. They also have a strong interest in being able to enforce their and their local governmental subdivisions' laws against tribes, which otherwise apply to tribal non-Indian country transactions or activities, without either the need to resort to official capacity suits where prospective relief is at issue or to face the potential practical inability to obtain retroactive relief.

Petitioner has forthrightly argued that, if its claim is sustained here, an Indian tribe with a reservation in one state has sovereign immunity "Anywhere In The United States." See Brief for Petitioner at 26. According to the Bureau of Indian Affairs, there are "more than 550 federally recognized Tribes in the United States, including 223 village groups in Alaska." U.S. Department of the Interior, Bureau of Indian Affairs, On the Web, p. 3. Each of these tribes, under the theory offered by Petitioner and the United States, has unfettered sovereign immunity to operate commercially in each of the fifty states and could, under their theory, commit torts, breach contracts, and violate state law generally without recourse for the States as against the offending tribe itself. This result is unacceptable practically and unjustified doctrinally.

SUMMARY OF ARGUMENT

The Petitioner and the United States seek here to have this Court expand the doctrine of tribal sovereign immunity to off-reservation commercial transactions of tribes. The demand is without legal basis. Neither the tribe nor the United States cites any basis in the common law of the States or in international law to support this expansion of tribal sovereign immunity. Indeed, States are not immune from suit in sister states even when conducting governmental business, and a foreign state does not possess immunity from suit regarding its commercial transactions within the United States by virtue of federal law.

The claim of the Petitioner and the United States is, moreover, directly contrary to this Court's precedent which holds that off-reservation commercial enterprises of a tribe are not immune from state taxation.

The United States and the Petitioner also downplay the significance of this litigation. In fact, the legal claim made here is that each of the 320 federally recognized tribes may conduct commercial enterprises in each of the fifty states without fear of incurring a civil liability. The claim effectively extends not only to contractual relations but also to tort actions and violations of state law generally. As a result, the Petitioner and the United States invite this Court to endorse the establishment of tiny enclaves of immunity from state law created by each of the 320 tribes in each of the fifty states.

The States submit that public policy considerations strongly argue against the proposed unprincipled extension of tribal sovereign immunity to off-reservation commercial transactions.

ARGUMENT

I.

NEITHER PETITIONER NOR THE UNITED STATES HAS DEMONSTRATED THAT THE TRIBES POSSESSED SOVEREIGN IMMUNITY BEYOND INDIAN COUNTRY AS A MATTER OF COMMON LAW.

The argument of Petitioner and the United States before this Court is simply that because the tribes have always had sovereign immunity off-reservation and because Congress has not seen fit to divest the tribes of

that attribute, it must still exist. The fundamental flaw in their argument, however, is that neither common law nor Congress has ever recognized such immunity in favor of Indian tribes. This conclusion flows ineluctably from *Nevada v. Hall*, 440 U.S. 410, 414 (1979), where the Court explained that the doctrine of sovereign immunity "is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." The doctrine of sovereign immunity, the Court explained, protected the "immunity of a truly independent sovereign from suit in its own courts." *Id.* That concept had its origins in the feudal system in which each petty lord was subject to suit in the courts of a higher lord; since there was no lord higher than the king, the king was necessarily immune from suit.¹ Here, however, the issue is whether Petitioner, or tribes in general, has sovereign immunity from suits in the courts of another sovereign with respect to conduct admittedly subject to the latter's regulation.

A. There Is No Substantial Basis in International Law to Recognize Sovereign Immunity for Off-Reservation Commercial Transactions.

In seeking to discover the basis for the tribal and federal claim to sovereign immunity for off-reservation commercial transactions, we first turn to transactions of foreign nations in federal courts. In so doing, we recognize that Petitioner and the United States correctly deny

¹ The idea that "the King could do no wrong" also supported the immunity of the king in his own courts. *Hall*, 440 U.S. at 415.

that the tribes can be classified as "foreign nations." Nonetheless, because they have failed to reveal the source of their theory with regard to the origin of off-reservation immunity, this Court's treatment of sovereign immunity claims by foreign nations provides a useful backdrop in answering the question presented.

This Court noted in *Hall*, 440 U.S. at 416, that the idea that a sovereign could not be sued in its own courts did not provide "support for a claim of immunity in *another sovereign's* courts." (Emphasis added.) The source of sovereign immunity in the courts of another sovereign must be found "either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity." *Id.*

In *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 145-146 (1813), this Court found that the United States had, in fact, agreed as a matter of comity not to subject a foreign sovereign's warship to the jurisdiction of the federal courts. This Court also noted that the person of a sovereign would be immune from arrest or detention within a foreign territory, *id.* at 137, as would the foreign ministers of that country or the troops of a foreign sovereign passing through the country with the permission of the host sovereign. *Id.* at 138-139. The Court noted, however, that there might well be a distinction with regard to a "prince" who conducts commerce in a foreign country indicating the possibility that such a prince might well be subject to the jurisdiction of the United States courts.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of

the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

Id.

Despite the implications of this passage from the *Schooner Exchange*, this Court a century later in *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926), found that because the government of Italy owned a commercial vessel, the vessel was immune from suit in the United States courts. As described by Professor Lowenfeld, the case

rested entirely on the Supreme Court's understanding of international law and precedent, without any reference to considerations of foreign policy or the desires of the United States Government. Indeed, in the *Pesaro* case itself, the State Department argued that immunity should not be granted to a commercial vessel in a claim arising out of a commercial transaction, but the Justice Department disagreed and declined to submit the State Department's opinion to the Court.

Andreas F. Lowenfeld, *Claims Against Foreign States – A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev.

901, 904 (1969). Two decades later, the Court affirmed the *Pesaro* holding without reference to international law

solely on the basis that the State Department's certificate and request "must be accepted by the courts as a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations."

Id. at 905 (discussing *Ex Parte Peru*, 318 U.S. 578 (1943)).

In 1952, matters took a new turn. The State Department concluded that foreign sovereigns should *not* be immune from suit "in cases involving what it called 'private' or 'non-public' acts as contrasted with 'sovereign acts.'" *Id.* at 906. Essentially, the new approach, captured in the "Tate Letter" of May 19, 1952, responded to the

widespread and increasing practice on the part of governments of engaging in commercial activities. . . .

44 N.Y.U. L. Rev. at 906 (quoting letter of Jack B. Tate of May 19, 1952). The practice then became for the State Department to advise the courts on whether to grant sovereign immunity based upon whether the transaction was a sovereign or public act or a private act. Therefore, from 1952 through 1976, the official policy of the State Department was that commercial transactions entered into by foreign powers were generally not entitled to sovereign immunity.

In 1976, the Foreign Sovereign Immunities Act of 1976 was enacted. The Act provides generally for actions against a foreign state based upon a commercial activity

carried on in the United States by the foreign state. 28 U.S.C. § 1605(a)(2). Sovereign immunity would not be recognized in such situations. It also provided for the waiver of a foreign state's immunity "by implication." *Id.* at § 1605(a)(1).

The history of a foreign sovereign's immunity from commercial transactions in United States courts thus is not consistent. It begins with an implication that such commercial transactions might subject the sovereign to the jurisdiction of United States courts, an implication repudiated a century later and then given new life by the State Department and finally Congress. The law of the United States is now clearly that foreign sovereigns are subject to jurisdiction for their commercial activities within the United States. The foregoing discussion reveals why Petitioner and the United States have adamantly declared that Indian tribes are not "foreign nations" for the purpose of sovereign immunity. *See* Brief for Petitioner at 26; Brief for the United States as Amicus Curiae Supporting Petitioner at 8. Quite clearly, this body of law does not support recognition by this Court of off-reservation sovereign immunity for commercial transactions.

B. Indian Tribes Cannot Claim Sovereign Immunity as "States."

Both Petitioner and the United States deny that tribes should be treated as "states" for the purpose of sovereign immunity law. *See* Brief for Petitioner at 24-25, 30; Brief for the United States at 8. They are forced to this position by *Nevada v. Hall*. In *Hall*, this Court found that whether

California recognized the sovereign immunity of Nevada with regard to a tort committed by a Nevada employee within California depended upon whether California desired to recognize that sovereign immunity as a matter of "comity." *See* 440 U.S. at 418, 425-427. The Court rejected the argument that California was bound by the Constitution to grant sovereign immunity to Nevada. It also sent a warning that the right of self-government might be implicated by an opposite conclusion. This Court noted:

In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which their State is subject only to limited liability in tort. But the people of California, who have no voice in Nevada's decision, have adopted a different system. Each of these decisions is equally entitled to our respect.

Id. at 426. Plainly, treatment of Petitioner as a State in view of this Court's jurisprudence would result in affirmation of the judgment below.

C. There Is No Basis in American Law to Require States to Grant Sovereign Immunity to Tribes for Their Off-Reservation Commercial Activities.

It would be anomalous to recognize sovereign immunity for off-reservation commercial activities in view of the treatment of foreign nations and States by this Court and by Congress. The tribes certainly do not possess more "sovereignty" than do foreign nations. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831) (the Framers did not have tribes "in view" when extending federal

court jurisdiction to controversies between States or citizens thereof and foreign states, citizens or subjects). The States' position is protected by the very text of the Constitution itself, together with the Tenth Amendment. Cf. *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 429 (1989) (plurality op.) (tribal inherent authority is less expansive than local government police powers); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-193 (1989) (tribes are not States).² Tribal power, on the other hand, is subject to complete defeasance by the United States. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Petitioner and the United States have failed to explain satisfactorily why tribes should have the benefit of the application of principles derived from feudal law in such a way as to confer tribes with a special benefit largely without precedent in the treatment of that feudal law by American courts.

² The unique status of the United States and States under the Constitution is also relevant to the issue, not presented here, whether they are immune from unconsented suit in tribal court. Both federal and state governments have so argued successfully in lower federal courts. See *United States v. Yakima Tribal Court*, 806 F.2d 853, 860-61 (9th Cir. 1986); *Montana v. Gilham*, 932 F. Supp. 1215 (D. Mont. 1996), *appeal docketed*, No. 96-35766 (July 18, 1996). As to States, finding such jurisdiction runs counter to their immunity from suit under the Eleventh Amendment in the courts of the tribes' immediate sovereign and would effectively expose them to the unreviewable authority of an extraconstitutional entity – authority that, for example, could be used to regulate States in a manner not permissible even to the federal government by virtue of the Tenth Amendment.

II.

PRECEDENT OF THIS COURT INDICATES THAT THE STATES MAY ENTERTAIN SUITS AGAINST INDIAN TRIBES ENGAGED IN COMMERCIAL ACTIVITIES OFF THE RESERVATION.

The essence of Petitioner and the federal government's argument, as demonstrated above, is not based on any historical analysis of the law of sovereign immunity as it relates particularly to commercial enterprises of Indian tribes or other entities. Instead, their theory proceeds upon the assumption that "the Constitution granted the United States the *sole power* to regulate relations with the Tribes. . . ." Brief for the United States at 12 (emphasis added); *see also* Brief for Petitioner at 30.

The United States thus contends that the States may not, consistent with the Constitution, exercise *any* jurisdiction over a private off-reservation individual's relationship with an Indian tribe. This Court has explicitly rejected this assumption. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 147-148 (1973), this Court held:

At the outset, we reject – as did the state court – the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land."

The Court added that the states *did* have jurisdiction over tribal activities occurring off reservation, absent "express federal law to the contrary." *Id.* at 148. The Court stated:

But tribal activities conducted outside the reservation present different considerations.

authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake [v. Egan]*, 369 U.S. 60, 75 (1962)]. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

Id. at 148-149. The Court accordingly rejected the argument that the commerce clause, *see id.* at 159, 161 (Douglas, J., dissenting), prohibited New Mexico from taxing a commercial enterprise, there a ski resort, operated by a tribe on off-reservation land leased from the federal government.

Mescalero Apache Tribe thus establishes that the States in fact do have jurisdiction over commercial enterprises of tribes off the reservation, and this Court has consistently adhered to that decision. *See, e.g., Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 2223 (1995) (principle that Indians and tribes are generally immune from state taxation "does not operate outside Indian country"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n.11 (1980). The United States, to be sure, admits that *Mescalero Apache Tribe* recognizes the authority of the state to tax commercial activities of tribes operating outside of Indian country. However, it argues that, although the States may have the right to "demand compliance with state law," Brief for the United States at 12, Petitioner's sovereign immunity nonetheless protects it from a suit to compel compliance with such law. The Government surprisingly relies upon *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991), for this proposition.

In *Potawatomi Tribe*, Oklahoma argued that a tribe should not be able to invoke sovereign immunity to prevent the collection of cigarette taxes because the cigarette sales did not occur on a "reservation." *Potawatomi Tribe*, 498 U.S. at 511. The Court's opinion extensively reviewed the question of sovereign immunity of the tribes. *Id.* at 508-510. The Court, in finding tribal immunity from liability for uncollected taxes, nevertheless did not simply state that sovereign immunity operated regardless of the transaction's locus. Instead, the Court quoted *Mescalero Apache Tribe* to the effect that state laws *could* be applied to a ski resort outside a reservation's boundaries operated by the tribe and that " 'absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law unless otherwise applicable to all citizens of the state.' " *Id.* at 511 (quoting *Mescalero Apache Tribe*, 411 U.S. at 148-149). *Mescalero Apache Tribe* was deemed to be not applicable *not because sovereign immunity shielded the tribe with regard to its off-reservation conduct but because the trust land in question had been " 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes."* *Potawatomi Tribe*, 498 U.S. at 511. *Potawatomi Tribe* says nothing about the suability of tribes for off-reservation activities where, unlike within their reservations, they are amenable to the full range of state regulatory and, by necessary inference, state adjudicatory jurisdiction absent contrary federal statutory or treaty provisions.

Petitioner and the United States' position, logically extended, consequently requires this Court to conclude that, while a State may regulate off-reservation conduct of tribes, it may not enforce that regulation directly

against them. That position makes no legal sense in view of the fact that authority to regulate a party's activity necessarily carries with it the right to compel prospective compliance or to seek a remedy, perhaps monetary in nature, for past violations unless the right to regulate is to be reduced to a meaningless abstraction. See *Rice v. Rehner*, 463 U.S. 713, 732 (1983); *Fort Belknap Indian Comm'y v. Mazurek*, 43 F.3d 428, 433-434 (9th Cir. 1994), cert. denied, 116 S.Ct. 49 (1995). Cf. *Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1413 (1997). Petitioner and the United States' effort at separating the notion of tribal sovereign immunity from that of a State's authority to regulate the underlying conduct cannot be credited without creating an anomalous distinction between the power to regulate and the power to enforce that regulation.

One further argument must be addressed. Petitioner argues that sovereign immunity ought to be recognized in this case in furtherance of the "unique trust responsibility" of the United States to tribes. Brief for Petitioner at 27. A similar argument was made and rejected in *Mescalero Apache Tribe*. There it was argued that the Indian Reorganization Act required an off-reservation tribal business on federal land to be treated as a "federal instrumentality." This Court recognized that a tribe "taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people." 411 U.S. at 151 (footnote omitted). This did not convert the tribe to an arm of the federal government, however, for the intent and purpose of the Reorganization Act was "'to rehabilitate the Indian's economic life and to give him a chance to develop the

initiative destroyed by a century of oppression and paternalism.'" *Id.* at 152 (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934)). Further, the Court found that the aim of the Indian Reorganization Act was "to disentangle the tribes from the official bureaucracy." *Mescalero Apache Tribe*, 411 U.S. at 153. By determining that the tribe's off-reservation commercial enterprises would not be treated as arms of the federal government, this Court embraced the concept that the Indian Reorganization Act should be interpreted to disentangle the Indian tribes from federal law when acting off-reservation, to remove the vestiges of paternalism in such cases, and to enable Indians to "enter the white world on a footing of equal competition." *Id.* at 152 (quoting 78 Cong. Rec. 11,732 (1934)); see also *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 578-581 (1928), quoted in *Mescalero Apache Tribe*, 411 U.S. at 153-155; see generally Bradley A. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 240-52 (1991) (reviewing legislative history of Indian Reorganization Act). In short, federal policy announced in the Indian Reorganization Act does not support off-reservation sovereign immunity for tribal commercial enterprises but supports the competition of such tribes in the greater commercial world, on a basis of equal competition.³

³ The argument has been made that Congress addressed the problem when it allowed tribes to create corporations under § 477 which could be sued. *Mescalero Apache Tribe* answers this argument, stating that "the question of tax immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business." 411 U.S. at 157 n.13.

III.

POLICY REASONS MILITATE AGAINST THE RECOGNITION OF OFF-RESERVATION SOVEREIGN IMMUNITY WITH REGARD TO TRIBAL COMMERCIAL ENTERPRISES.

Petitioner and the United States argue, as we understand it, that it is good public policy for this Court to explicitly embrace the legal theory that each of the 320 Indian tribes in the United States⁴ may conduct commercial enterprises off reservation without fear of incurring a civil liability in the courts of any of the fifty states.

Some of the description of the enormity of what Petitioner and the United States suggest is in order. First, there are over 320 recognized Indian tribes. As of December 1996, 184 tribes were operating between 275 and 280 bingo halls or casinos. Carroll, *National Gambling Impact Study Commission, What Hand Will They Deal Tribes?* XII American Indian Report 12, 13 (Aug. 1997). Some of these operations generate very substantial income for the tribes. The tribes, appropriately so, now seek to invest their funds in other enterprises. A recent article describes the Sault Ste. Marie Tribe as making a "respectable profit from their casinos, which posted about \$267 million in gross revenues in 1995." Carroll, *Cashing in on Gaming Revenue, Tribes Use Cash From Casinos and Bingo Halls to Build Economy*, XII American Indian Report 16 (Aug. 1997). The article reports that the Sault Ste. Marie conducted "seventeen non-gaming businesses" in 1995. *Id.*

⁴ Perhaps each of the 200 plus Alaskan villages also should be added to this total, although neither Petitioner nor the United States discloses its position on that point.

Among these businesses were a construction company, a professional cleaning service, a "successful development company," a chain of hotels, and a joint venture involving the production of driveshafts. *Id.* at 17. (The article does not directly discuss the "reservation" or "Indian country" status of the lands on which these enterprises are located. Some of the lands appear to have such status while others, e.g., a hotel in Grand Rapids, do not.)

The question therefore becomes whether, in the investment of significant sums in various enterprises, the off-reservation commercial enterprises should then be subject to sovereign immunity. A tribe, of course, is not confined to commercial enterprises in its home state or area. Indeed, the business climate of another section of the country may well make it advisable to invest far from the reservation. The business options open to each one of the 320 tribes, perhaps in combination with other financial interests, are virtually limitless. Petitioner and the United States accordingly now ask this Court to issue an invitation to each of the federal tribes to establish commercial enterprises throughout the United States, even in states in which no "Indian country" now or has ever existed, and to sanction in advance tribal immunity from lawsuit for their activities.

Petitioner and the United States argue that a commercial enterprise dealing with a tribe can protect itself through careful commercial practices. *See, e.g.*, Brief for the United States at 27. And the latter suggests that a person or entity

may simply refuse to deal with the sovereign that will not consent to suit, if it deems the likely gain not worth the risk or inconvenience

(as it might, for example, if the sovereign had developed a reputation for failing to honor its obligations).

Id. This position ignores two important considerations. First, many of those dealing with Indian tribes in each of the fifty states will not possess the sophistication to recognize that an Indian tribe, or a tribal enterprise partaking of a tribe's immunity, is situated differently from other persons with whom they deal in the ordinary course of business. Second, the immunity endorsed by the United States is not limited to consensual commercial transactions; it encompasses any form of legal claim, whether by a private party in the form of tort action for negligence or a governmental entity seeking compliance with, and monetary relief for violation of, state law.

In sum, accepting Petitioner and the United States' view of tribal immunity means that tiny enclaves of immunity from state law against tribes qua tribes may be set up in each of the States by each of the 320 tribes. Each of these enterprises will be able to assert immunity from actions for breach of contract or for personal injury for damages. Each will be similarly immune for actions against their commercial enterprises with regard to wrongful termination of employment, labor disputes, and state discrimination suits.⁵ The policy consequences of

⁵ This Court suggested in *Potawatomi Tribe*, 498 U.S. at 514, the applicability of remedial principles developed under *Ex parte Young*, 209 U.S. 123 (1908), with respect to tribal officers even as to on-reservation transactions. It also left open the possibility that retroactive relief might be available against them. *Potawatomi Tribe*, 498 U.S. at 514. Lower federal courts have applied the *Young* rationale to sustain awards of prospective relief in various contexts where *federal law*

Petitioner and the United States' position are therefore quite significant. See generally Comment, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173 (1988); submission of Lawrence Long, Chief Deputy Attorney General, State of South Dakota, S. Hrg. 104-694 (Sept. 24, 1996), pp. 88-130. Coupled with the unprincipled nature of the proposed extension of tribal sovereign immunity to off-reservation conduct otherwise subject to state regulation, these considerations counsel strongly in favor of affirming the judgment below.

limitations on tribal authority were arguably exceeded. See, e.g., *Arizona Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1995); *Tamiami Partners, Ltd. v. Miccosukee Tribe*, 63 F.3d 1030, 1050-51 (5th Cir. 1995); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Comm'y*, 991 F.2d 458, 460 (8th Cir. 1993). Whether retroactive relief is available in such a situation – at least where the relief is effectively against the involved tribe – appears undecided. Moreover, exploration in federal court of *Potawatomi Tribe's* implications with respect to retroactive relief in the context of a simple breach of contract claim such as that here, garden variety tortious conduct, or mere violation of state law has been made difficult because of the ordinary need to establish jurisdiction under 28 U.S.C. § 1331. See, e.g., *Montgomery v. Flandreau Santee Sioux Tribe*, 905 F. Supp. 740, 746 (D.S.D. 1995) (no federal question jurisdiction where alleged breach of fiduciary duty arose under tribal, not federal, law); *Whiteco Metrocom Div. v. Yankton Sioux Tribe*, 902 F. Supp. 199, 202 (D.S.D. 1995) (breach of contract claim provided insufficient jurisdictional basis). The upshot is that the availability of *Young*-based prospective relief against tribal officers may be severely limited and, even if retroactive relief is assumed to be capable of being awarded against an officer or employee in his personal capacity, such relief may well prove unavailing as a practical matter because of the absence of either indemnification from a tribe or insurance.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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